Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether farmers are "intended" third-party beneficiaries of their irrigation district's water service and repayment contracts with the U.S. Bureau of Reclamation and, therefore, entitled to sue the Bureau for breach thereof, as the Federal Circuit has long held, or merely "incidental" third-party beneficiaries and, therefore, not so entitled, as the Ninth Circuit holds in the decision below.

LIST OF PARTIES

The plaintiffs and appellants below, petitioners here, are Francis A. Orff; Brooks Farms II; Brooks Farms IV; Brooks Farms V; G.S. Farms; Five-D Westside Farms, Inc.; R&S Farming; Cardella Ranch; Gramis Family Farms II; Edwin R. O'Neill, BRO Partnership; BTO Partnership; EJC Partnership; ERO Partnership; JEO Partnership; SLO Partnership; TBO Partnership; C.S. Stefanopoulos Trust; Elena Stefanopoulos Trust; Estate of Helen Stefanopoulos; D.D. Stefanopoulos Trust; Pagona Stefanopoulos; Sumner Peck Ranch, Inc.; Y. Stephen Pilibos; and Pilibos Children's Trust.

Westlands Water District intervened in the Court of Appeals as an appellant.

The defendants and appellees below, respondents here, are United States of America; United States Department of the Interior; Bureau of Reclamation; Fish and Wildlife Service; United States Department of Commerce; National Marine Fisheries Service; Ronald H. Brown, Secretary of Commerce; and Bruce Babbitt, Secretary of Interior.

Parties who intervened below as defendants and appellees are Natural Resources Defense Council; United Anglers of California; Save San Francisco Bay Association; California Waterfowl Association; Sierra Club; Bay Institute of San Francisco; Environmental Defense Fund; California Striped Bass Association; Trout Unlimited of California; Sacramento River Council; California Sportfishing Protection Alliance; Pacific Coast Federation of Fisherman's Associations; the Wilderness Society.

CORPORATE DISCLOSURE STATEMENT

None of the petitioners has a parent corporation nor a nonwholly owned subsidiary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Orff, et al. v. United States, et al.*, 358 F.3d 1137 (9th Cir. 2004). Appendix A. The Ninth Circuit affirmed the district court's unreported Final Judgment, filed August 11, 2000 and Memorandum Opinion and Order re Federal Defendants' Motion to Reconsider, filed April 12, 2000. Appendices B, C.

STATEMENT OF JURISDICTION

The Ninth Circuit's judgment was entered February 18, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition presents a question of federal government contract law which is not dependent on statute. *U.S. v. Seckinger,* 397 U.S. 203, 209 n. 12 (1970), *reh'g denied,* 397 U.S. 1031 (1970); *U.S. v. County of Allegheny,* 322 U.S. 174, 183 (1944), *overruled on other grounds, U.S. v. City of Detroit,* 355 U.S. 466, 471 (1958). A statute under which the question arises is 43 U.S.C. § 390uu. Appendix D.

STATEMENT OF THE CASE

A. The Reclamation Program

The Bureau of Reclamation of the U.S. Department of the Interior constructs and operates water projects in the 17 western states and sells and delivers irrigation water for use by farmers.[1] The reclamation legislation was originally enacted in 1902 and has been repeatedly amended by Congress. The quantity of water to be sold and delivered by the Bureau and bought and used by farmers in a given service area, and the payments to be made by the farmers therefor, are governed by that legislation, as well as the reclamation contracts, water rights, and judicial decrees which implement it.[2] The program depends, in major part, on the contract and property rights which arise in connection with its implementation.

During the first quarter century of the program's existence, the Bureau contracted directly with individual farmers or groups of farmers. However, in 1926 Congress directed that

[1] This Court described the reclamation program in *Nevada v. U.S.,* 463 U.S. 110, 115, 128 (1983), *reh'g denied,* 464 U.S. 875 (1983).

[2] "The legislation establishing and expanding these projects has created a highly complex system of rights and interests, some in the Government, some in the districts, some in the individual water users . . .." *Burley Irrigation District v. Ickes,* 116 F.2d 529, 539 (D.C. Cir. 1940), *cert. denied,* 312 U.S. 687 (1941).

no water shall be delivered upon the completion of any new project until a contract or contracts shall have been made with an irrigation district or districts organized under state law providing for payment of the cost of constructing and operating and maintaining the waterworks. 43 U.S.C. § 423(e).[3] In 1939 Congress delineated in greater detail the nature and function of "repayment" contracts under which the Bureau recovers the costs of internal distribution works. *Id.* at § 485h(d). It also provided for the Bureau's use of "service" contracts to recover the costs of major supply works. *Id.* at § 485h(e). Legislation enacted in 1956 provided that a party to any repayment or service contract shall have a first right to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within its boundaries. 43 U.S.C. § 485h-l(4).[4]

Property principles also pervade the reclamation program. Section 8 of the 1902 act provides that nothing therein shall be construed to interfere with the laws of any state relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Bureau, in carrying out its provisions, shall proceed in conformity with such laws, and nothing therein shall in any way affect any right of any landowner, appropriator, or user

[3] The overall purpose of the 1926 legislation was "to provide relief to settlers," not "to change the policy of reclamation law." *Yellen v. Hickel,* 335 F.Supp. 200, 204 (S.D. Cal. 1971), *rev'd on other grounds,* 559 F.2d 509 (9th Cir. 1977), *on rehearing,* 595 F.2d 525 (9th Cir. 1979), *reversed and vacated in part sub nom., Bryant v. Yellen,* 447 U.S. 352 (1980), *reh'g denied,* 448 U.S. 911 (1980). An irrigation district is resorted to by the Bureau and farmers "for convenience" in the distribution of water and the collection of charges. *Nampa & Meridian Irrigation District v. Bond,* 283 F. 569, 570 (D. Id. 1922), *aff'd,* 288 F. 541 (9th Cir. 1923), *aff'd.,* 268 U.S. 50 (1925).

[4] The Bureau is bound to perform its contracts. *E.g., U.S. v. Coachella Valley County Water District,* 111 F.Supp. 172, 180 (S.D. Cal. 1953) ("A contract is a contract . . .").

of water. 43 U.S.C. §§ 383, 485h-4. The 1902 act further provides that the right to the use of water acquired thereunder shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right. *Id.* at §§ 372, 485h-4. This Court has explicated these property rights in several landmark cases. The right to use the water is acquired by prior appropriation. *Ickes v. Fox,* 300 U.S. 82, 95 (1937), *reh'g. denied,* 300 U.S. 640 (1937). The appropriation is perfected by application of the water to the land by the farmers. *Nevada*, 463 U.S. at 116; *Nebraska v. Wyoming,* 325 U.S. 589, 614 (1945). The water right is the property of individual landowners. *Ickes*, 300 U.S. at 95; *Nebraska,* 325 U.S. at 615-16. Such right is part and parcel of the land on which the water has been applied. *Ickes,* 300 U.S. at 95-96.

B. The Water Rights of Petitioners

The Central Valley Project in California was authorized in 1937 and reauthorized in 1954. 50 Stat. 844 (Aug. 26, 1937); 68 Stat. 879 (Aug. 27, 1954). The CVP's key feature is Shasta Dam at the northern reaches of the Sacramento River. Water collected behind it is released by the Bureau, flows southward to the Sacramento-San Joaquin Delta, and is diverted by opening the gates of the Delta cross channel located in the north of the Delta and distributed from the Delta to various CVP units.[5]

In anticipation of the authorization and construction of the San Luis Unit, to be located in the southwestern sector of the CVP, various farmers on the west side of the San Joaquin Valley organized the original Westlands Water District in 1952 under the California Water District Law. California Water Code § 34000 et seq. [6] The original Westlands district

[5] The CVP is described in *Dugan v. Rank,* 372 U.S. 609, 611-14 (1963).

[6] A water district is treated for certain purposes as a special-purpose unit, not a general-purpose government. *Salyer Land Co. v. Tulare Lake*

was a 400,000 acre area, and petitioners now farm there. California water districts are authorized to contract with the Bureau for irrigation water. *Id.* at § 35875 et. seq. The right to use water acquired thereunder shall be furnished in accord with federal reclamation law. *Id.* at § 23200.[7]

The original Westlands district filed an application for state water rights in 1954. It assigned that application to the Bureau in 1960. The Bureau requested such assignment because the application carried a preferred priority date and assignment would expedite construction of the Unit. It promised that a permanent water supply for the district would be assured and made available pursuant to a reclamation contract.

The Bureau subsequently obtained the necessary water rights to build the Unit. The state water rights board rendered four decisions which ordered that permits be issued to the Bureau for the benefit of the farmers who were to be the true owners of the permanent right to use the water, which right shall be appurtenant to the land to which the water is applied. Decision D-893, 1958 WL 5645 at 34; Decision D-935, 1959 WL 5685 at 47-50; Decision D-990, 1961 WL 6816 at 37; Decision D-1020, 1961 WL 6846 at 10.

The San Luis Unit was authorized by Congress in 1960. Pub. L. 86-488, 74 Stat. 156 (June 3, 1960). Section 1(a) of the 1960 act establishes the principal purpose of the Unit as furnishing irrigation water and the service area as the west side of the San Joaquin Valley.[8] It provides that the principal

Basin Water Storage District, 410 U.S. 719, 726-35 (1973); *Ball v. James,* 451 U.S. 355, 362-72 (1981). California law is to similar effect. *Not About Water v. Board of Supervisors*, 116 Cal.Rptr.2d 526, 536-39, 95 Cal.App.4th 982 (2002).

[7] An irrigation district is obligated to deliver reclamation project water to its farmers. *Bryant*, 447 U.S. at 371 n. 23.

[8] The authorizing legislation was discussed in a recent case brought by original Westlands farmers against the Bureau challenging its failure to

engineering features shall include, among other things, the San Luis Dam and Reservoir, the San Luis Canal, and intra-district distribution systems. The act mandates that construction shall not be commenced until the Bureau has secured all rights to the use of water necessary to carry out the purposes of the Unit. The original Westlands district embraced the majority of the Unit's service area. Water for the Unit flows to the Tracy Pumping Plant located in the south of the Delta, is pumped south through the Delta-Mendota Canal, is stored in the San Luis Reservoir, and thereafter resumes its flow through the San Luis Canal and, then, the district's internal distribution system to farmers' lands.

The farmers in the original Westlands area are third-party beneficiaries of a 1963 water service contract between the original Westlands district and the Bureau pursuant to which they bear their share of the costs of constructing and operating and maintaining the major project supply facilities. They are also beneficiaries of a 1965 repayment contract pursuant to which they repay the costs of the internal distribution system. Recordable contracts were also made by the Bureau and most landowners or their predecessors in the late 1960s and early 1970s relating to the sale of land in excess of acreage limits. All these contracts contain preambles and recitals stating they were made pursuant to federal reclamation statutes.[9]

Article 3(d) of the 1963 contract provides that each year the Bureau "shall furnish" 900,000 acre-feet of water to the district for use on its eligible lands. [10]

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provide drainage service. *Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, 570, 571, 573-74 (9th Cir. 2000).

[9] The terms of a government contract include the authorizing statutes in effect at the time it was made. *Lynch v. U.S.*, 292 U.S. 571, 577 (1934).

[10] The quantity terms of the 1963 contract were later discussed by the Ninth Circuit in *O'Neill v. U.S.*, 50 F.3d 677, 680 (9th Cir. 1995), *cert. denied*, 516 U.S. 1028 (1995).

Article 3(d) of the 1963 contract also provides that the original Westlands district "shall . . . pay for" the water under Article 6(a) thereof, which in turn provides that the water service component of the rate "may not be in excess" of $7.50 per acre foot.[11]

The farmers in the case at bar charge that the Bureau breached the above water quantity and water price terms of the 1963 contract. The petition before this Court also involves certain other terms thereof. In general, the 1963 contract provides that the benefits of using the water purchased thereunder, and the burdens of paying therefor, are enjoyed and borne by its farmers.[12]

For example, the 1963 contract recites that "lands within the boundaries of the District are at present in need of additional water for irrigation . . . and that an additional water supply to meet these present and potential needs can be made available by and through the works constructed . . . by the United States." Articles 1(a) and 12 provide that the water furnished thereunder is for "agricultural use," defined as water use "in the commercial production of agricultural crops or livestock." Article 3(f) provides that the "right to the beneficial use of water . . . shall not be disturbed . . . ." Article 5 prohibits water from being "sold or otherwise disposed of for use outside" the district. Articles 14, 16, and 17 provide that the payments for water service are ultimately borne by farmers and secured by liens on their lands and that

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[11] The price terms were discussed in two cases involving claims by original Westlands farmers against the Bureau. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814, 816, 824-25 n. 17 (9th Cir. 1990), *cert. denied, Boston Ranch Co. v. Department of Interior*, 498 U.S. 998 (1990); *U.S. v. Westlands Water District*, 134 F.Supp.2d 1111, 1118, 1138-39 (E.D. Cal. 2001).

[12] Several cases have so noted. *Barcellos & Wolfsen*, 899 F.2d at 816 ("beneficiaries"); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715, 731, 732, 746 (E.D. Cal. 1993) ("third-party beneficiaries"); *U.S. v. Westlands*, 134 F.Supp.2d at 1156 ("real parties-in-interest").

Westlands, itself, neither uses the water nor bears the cost of paying therefor. Articles 23, 24 and 25 set forth the recordable contract and excess lands provisions required under reclamation law, which condition a water user's right to water upon compliance with such provisions. Article 29(b) of the 1963 contract refers to the "benefit that may arise by reason of this contract" to a landowner within the district.

In particular, Article 11(b) of the 1963 contract provides for an adjustment for water shortages as the remedy of "anyone having or claiming to have . . . through, or under the District the right to the use of any of the water supply provided for herein."[13] Article 9(c) similarly contemplates water being used for irrigation by "those claiming . . . through, or under the District."

Finally, Article 15 of the 1963 contract provides that water shall not be furnished for the benefit of any lands or water users, except upon the payment by the landowner of his assessment for such water. Article 15 specifies that:

> "Payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, . . . shall be held to authorize or permit any water user or the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user." [14]

In July 1963, the original Westlands district filed an *in rem* action in state court to determine the validity of the 1963

[13] The Court of Appeals in the case at bar discussed this article in detail. Appendix A at 13a, 14a.

[14] The Court below also focused on this article. Appendix A at 11a-13a.

contract. This was done pursuant to Article 32 of the 1963 contract and applicable federal statutes. 43 U.S.C. §§ 423e, 511. In December 1963, the state court entered judgment validating the contract as against all persons.

Also in 1965, after the original Westlands district and the Bureau had signed the service and repayment contracts, the district and the former West Plains Water Storage District, a newer and smaller district on Westlands' western border, which had no contract with the Bureau, merged. California Water Code § 37800 et seq. Section 37856 thereof provides:

> "Lands which were within the Westlands Water District immediately prior to the merger shall, so long as said lands remain in the said district, have a prior right with respect to water to which said district was entitled under any contract with the United States in effect on the date of said merger over . . . lands added to the Westlands Water District as a result of the merger . . ."[15]

Between 1968 and 1978, the Bureau honored the pre-merger Westlands farmers' water rights under the quantity and price terms of the 1963 contract. Farmers in that area bought at least 900,000 acre-feet of water each year and paid $7.50 per acre-feet for such water service. Thereby, the water rights for the Unit were duly perfected and the appropriate share of project costs was duly repaid.[16]

But, starting in 1979 and lasting until 1986, the Bureau attempted to reduce water deliveries to pre-merger lands for supposed fish and wildlife purposes and to raise prices of the remaining water sold to the farmers for supposed budgetary purposes. District court litigation ensued among class

[15] The prior rights of pre-merger lands over merged lands was later discussed in *Sumner Peck Ranch*, 823 F.Supp. at 720-21, 726-27.

[16] The initial performance of the Bureau was addressed in *O'Neill*, 50 F.3d at 681.

representatives of pre-merger lands, class representatives of merged lands, the enlarged Westlands Water District, and the Bureau.[17]

During the course of the litigation several events occurred relating to the farmers' right to sue the Bureau for breach of the quantity and price terms of the 1963 contract. First, in 1980 the district court rejected the Bureau's defense of sovereign immunity. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F.Supp. 263, 266-67 (E.D. Cal. 1980).[18] Second, in 1982 Congress enacted 43 U.S.C. § 390uu, which gave consent to join the Bureau as a necessary party in any district court suit to adjudicate the contractual rights of a contracting entity and the Bureau regarding any contract executed pursuant to federal reclamation law. Appendix D. Third, in 1984 the Court of Appeals for the Federal Circuit ruled in *H.F. Allen Orchards v. U.S.*, 749 F.2d 1571, 1576 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985), that farmers were "intended" third-party beneficiaries of their irrigation district's reclamation contracts with the Bureau and, thus, had standing to sue the Bureau for breach of those contracts.[19]

[17] This litigation was later discussed in several cases adjudicating claims by pre-merger farmers against the Bureau. *Barcellos & Wolfsen*, 899 F.2d at 817; *O'Neill*, 50 F.3d at 681; *U.S. v. Westlands*, 134 F.Supp. 2d at 1118-19.

[18] The court concluded it would adjudicate rights to the use of water acquired to operate the Unit, citing 43 U.S.C. § 666(a)(1) and *Dugan*, 372 U.S. at 618-19. It also concluded it would administer rights previously adjudicated, citing 43 U.S.C. § 666(a)(2) and *Federal Youth Center v. Jefferson County District Court*, 575 P.2d 395, 398 (Colo. 1978).

[19] The Court of Federal Claims has jurisdiction to render judgment upon any claim against the U.S. founded upon any express or implied contract with the U.S. 28 U.S.C. § 1492(a)(1).

The litigation was resolved in 1986 by a stipulated judgment. The judgment declared that the 1963 contract is "a valid, enforceable and implementable contract" and commanded that the Bureau "shall perform" it. It declared that the 1963 contract entitles the district to "water and other service" by the Bureau "as specified therein." It also awarded the farmers a refund of about $50 million for past overcharges and declared the future rate to be paid to the Bureau for water service to be "$7.50 per acre foot, as specified in the 1963 contract." The district explicitly acknowledged in the stipulated judgment that "it entered into the 1963 contract for the benefit of the [pre-merger area] and the lands therein." The stipulated judgment provided that a party may obtain relief against the Bureau for a future violation thereof or any contract obligation by way of either a motion to enforce the judgment or a new action. Finally, the court appointed representatives to protect the farmers in each area.[20]

C. Interim Litigation

But future sales of water in the quantity and at the rate originally agreed and subsequently ordered were not to be, and litigation between pre-merger area farmers and the Bureau was not to cease. Within a year of the 1986 stipulated judgment, Congress raised the water rate more than fivefold on farmers owning excess lands under extended recordable contracts. Farmers moved in district court to challenge the validity of this new surcharge. Their standing to sue the Bureau was not questioned, but their claim was rejected on the merits by the district court and, then, on appeal. *Barcellos & Wolfsen*, 899 F.2d at 821-26. The Ninth Circuit concluded

[20] The 1986 stipulated judgment was discussed in several of the subsequent cases involving farmers' claims against the Bureau. *Barcellos & Wolfsen*, 899 F.2d at 819, 825-26; *Sumner Peck Ranch*, 823 F.Supp. at 737, 738; *O'Neill*, 50 F.3d at 681; *U.S. v. Westlands*, 134 F.Supp.2d at 1120-21.

the 1963 contract was insufficiently explicit and, therefore, should be construed to allow the exercise of sovereign power. *Id.* at 824-25 n. 18.

Three suits relating to the failure to provide necessary drainage service were also pursued against the Bureau by farmers in the pre-merger area of Westlands during the 1990s. First, farmers owning excess lands claimed entitlement to the 1963 contract rate for so long as the Bureau failed to provide such service. The court upheld the farmers' claim. *U.S. v. Westlands*, 134 F.Supp.2d at 1134-44. It rejected the Bureau's sovereign power defenses. *Id.* at 1144-54.[21] The court also recognized the right of the farmers to recoup the payments they had made for drainage service which had not been provided. *Id.* at 1154-56. Second, farmers in Westlands' pre-merger area also filed a separate action seeking, among other things, to enforce the government's drainage obligations, including claims for contract damages. In *Sumner Peck Ranch,* the district court generally upheld the farmers' pleadings. 823 F.Supp. at 737-49. In particular, the court ruled that the farmers had standing to sue the Bureau for its failure to perform its contractual drainage duties. *Id.* at 745-47. Third, in *Firebaugh Canal Co.*, the Ninth Circuit affirmed in major part the district court's partial judgment compelling the Bureau to perform its drainage obligation. The Court held that Congress had mandated unambiguously in 1960 that the Bureau build necessary drains. 203 F.3d at 573-74. It ruled that the Bureau unlawfully withheld such action and that it must be compelled to perform its statutory duty under 5 U.S.C. § 706(1). *Id.* at 577-78.

[21] This Court had recently explicated the elements of these defenses. *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996); *see also Mobil Oil Exploration v. U.S.*, 530 U.S. 604 (2000).

Still another interim lawsuit was a precursor to the underdelivery claim in the case at bar. Original Westlands farmers sought specific performance of (but not money damages for) the Bureau's water delivery duty during the 1993 water year, and the Bureau defended on the ground that it had become impossible to honor the contract because of subsequent sovereign action. The Ninth Circuit affirmed the district court's rejection of the farmers' contract interpretation in *O'Neill.* 50 F.3d at 682-87. The Court also affirmed the district court's abstention as to evaluating the merits of the Bureau's defenses resting on alleged statutory and regulatory mandates. *Id.* at 687-89. It further affirmed that judicial review of such issues would take place, instead, in the case below. *Id.* at 680, 682. It described the underdelivery claim as a challenge to the Bureau's method of compliance with federal statutes. *Id.* at 688. It noted that this challenge includes the farmers' contentions that the underdeliveries were in violation of law and not mandated by law. *Id.* at 689 n. 7.

D. Proceedings Below

In the instant case farmers seek money damages from the Bureau charging two breaches of the 1963 contract. First, they charge the Bureau reduced the quantity of water it sold by about half (the reduction involved in *O'Neill*) in breach of the quantity terms. Second, beginning in the early 1990s the Bureau began assessing Unit farmers with "mitigation and restoration payments" under a new statute, as a result of which the farmers' price per acre-foot has been about twice the $7.50 per acre-foot contract rate.

The Westlands district originally instituted this suit in 1993. The farmers intervened later that same year.[22] In 1995

[22] The petitioners initially sought equitable relief on their underdelivery and overcharge claims under a due process theory. *Westlands Water District v. Department of Interior*, 850 F.Supp. 1388, 1397-98, 1401, 1408

the district was allowed to drop out of the case on specified terms. Thereafter, the farmers alone prosecuted their claims for money damages for breach of contract.

The main proceedings in the district court consisted of three rounds of cross-motions for partial summary judgment. In 1997 the court denied all motions on the merits. In 1998 the court denied the Bureau's motion which claimed, for the first time, that the farmers lacked standing to sue. It also made two rulings on the merits. First, the court dismissed petitioners' overcharge claim. Second, it narrowed, but did not dismiss, their underdelivery claim. As a consequence, the case was poised for trial on the farmers' underdelivery claim and the Bureau's claimed defenses.

In 2000 the case was disposed of when the district court reversed its prior ruling and held that the farmers lacked standing to sue. Appendix C. The Court ruled that the farmers were incidental, not intended, third-party beneficiaries of the 1963 contract in light of the Ninth Circuit's decision the year before in *Klamath Water Users Protective Assn. v. Patterson*, 204 F.3d 1206, 1210-12 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000).

The Ninth Circuit in the opinion below affirms the ruling that the farmers may not sue the Bureau. Appendix A at 5a-17a. Extending the rationale of *Klamath*, the Court holds that the farmers were incidental, not intended, third-party beneficiaries of the 1963 contract's quantity and price terms.

(E.D. Cal. 1994). The district court held on the Bureau's pleading motion that the farmers were entitled to pursue their claim that the underdeliveries were inconsistent with federal statutes. *Id.* at 1400, 1401, 1426-27. It granted them leave to amend their overcharge claim. *Id.* at 1408-09, 1426-27.

Appendix A at 11a-16a. The Court explicitly declines to follow the Federal Circuit's contrary 1984 decision in *H.F. Allen Orchards*. Appendix A at 14a n. 5.[23]

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FEDERAL CIRCUIT AND THE NINTH CIRCUIT ON THE IMPORTANT QUESTION OF WHETHER A FARMER IS AN INTENDED THIRD-PARTY BENEFICIARY OF A RECLAMATION CONTRACT BETWEEN HIS OR HER IRRIGATION DISTRICT AND THE BUREAU OF RECLAMATION, AS THE FEDERAL CIRCUIT HAS LONG CORRECTLY HELD, OR AN INCIDENTAL BENEFICIARY, AS THE NINTH CIRCUIT INCORRECTLY HOLDS.

There are three reasons why review is warranted. First, the Ninth Circuit's decision below directly conflicts with a ruling published twenty years ago by the Federal Circuit, a ruling that has been unquestioned and relied upon by both farmers and the Bureau ever since. Second, whether a farmer is an intended or incidental beneficiary of his or her district's contract with the Bureau is important, especially where the district, as is often the case, is unwilling or unable to assert against the Bureau a claim of breach of contract. Third, the reasoning of the Federal Circuit took into due account the nature of the parties and the structure of the legal and economic relations among them, whereas the Ninth Circuit's decision below simply rests on an unwarranted presumption and an inappropriate mode of contract construction.

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[23] The Ninth Circuit also vacates the district court's earlier merits rulings which had narrowed the farmers' underdelivery claim and dismissed their overpayment claim. Appendix A at 17a-20a.

A. The Federal Circuit has long held that a farmer is an intended third-party beneficiary of his or her district's reclamation contract with the Bureau, but the Ninth Circuit now holds that he or she is merely an incidental beneficiary thereof.

Prior to 1984 a number of state law cases had held that a property owner was an intended third party beneficiary of a contract under which his or her city purchased water service from a water supplier. [24]

In the *H.F. Allen Orchards* decision of 1984, the Court of Appeals for the Federal Circuit announced the rule, consistent with such line of cases, that a farmer is an intended third-party beneficiary of his or her irrigation district's reclamation contract with the Bureau. The facts of that case were that in 1905 the Bureau constructed the Yakima Project in eastern Washington. It initially contracted directly with farmers in the Yakima Valley to provide them with water service from the project. After the 1926 amendments to the reclamation act, farmers established under Washington law ten irrigation districts within the project, and each such district then made a repayment contract with the Bureau. In 1937 this Court analyzed the water rights of farmers in the Yakima Project in the *Ickes* case. In 1943 the Court of Appeals for the D.C. Circuit affirmed that the water rights were property of the farmers, water thereunder was to be distributed under state law priorities, the quantity was to be determined by actual use, and use is reasonable where water is diverted and applied using methods customary in the locale. *Fox v. Ickes*, 137 F.2d 30, 33, 35 n. 9 (D.C. Cir. 1943), *cert. denied*, 320 U.S.

[24] *See, e.g., Woodbury v. Tampa Waterworks Co.*, 49 So. 556, 559-62 (Fla. 1909); *Pineville Water Co. v. Bradshaw*, 266 S.W.2d 305 (Ky. 1954); *Potter v. Carolina Water Co.*, 116 S.E.2d 374 (N.C. 1960); *Harris v. Board of Water and Sewer Commission*, 320 So.2d 624, 628 (Ala. 1975).

792 (1943). In 1945 still further litigation seeking to determine the specific water rights of all project farmers was resolved by consent decree. Under that decree, senior water rights were not proratable, whereas junior water rights were proratable, in the event of shortage. Thereafter, the districts and the Bureau made new or amended reclamation contracts which incorporated the terms of the consent decree. In 1977, a drought year, the Bureau initially projected that the junior right holders would be able to buy that year only a small portion of the water to which they were otherwise entitled. They responded by fallowing much of their land. A wet spring, however, ultimately resulted in deliveries that year aggregating 70% of normal. About 160 out of many thousands of junior right holders, who had been unable to persuade any of their districts to sue the Bureau, sued it themselves, claiming that the initial estimate violated an implied promise in their districts' contracts. The claims court ruled, among other things, that the farmers could not sue the Bureau directly. *H.F. Allen Orchards v. U.S.*, 4 Cl.Ct. 601, 607-13 (1984).[25] However, the Federal Circuit reversed on this point, holding, as follows:

> "[W]e disagree with the Claims Court's determination that appellants were not correct parties to sue under the consent decree and subsequent alleged implied contracts. It is undisputed that appellants have a property right in the water to the extent of their beneficial use thereof. *Fox v. Ickes, supra.* The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the

[25] The court cited a conflicting line of cases decided under state law holding that property owners were only incidental third-party beneficiaries of their cities' contracts with water suppliers, such as *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 231-32 (1912) and *H.R. Moch Co., Inc. v. Rensslaer*, 247 N.Y. 160, 164-66, 159 N.E. 896, 897-98 (1928). 4 Cl. Ct. at 610.

> government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court 'every action shall be prosecuted in the name of the real party in interest.' Claims Court R. 17(a). Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest." *H.F. Allen Orchards*, 749 F.2d at 1576.[26]

Allen Orchards has since been cited and followed by the claims court in analogous contexts. *Busby School of Northern Cheyenne Tribe v. U.S.*, 8 Cl. Ct. 596, 602 (1985) (tribe members were intended third party beneficiaries of a contract between their tribally-elected school district and a federal agency); *Schuerman v. U.S.*, 30 Fed. Cl. 420, 430 (1994) (borrowers were intended beneficiaries of a contract between their lender and a federal agency).[27] Another claims court case holds that an equipment rental company was the intended third-party beneficiary of a road construction contract between a tribe and the government. *Carlow v. U.S.*, 40 Fed.Cl. 773, 779-83 (1998). *H.F. Allen Orchards* was also cited by the claims court in *General Dynamics Corp. v. U.S.*, 47 Fed. Cl. 514, 531-32 (2000), for the proposition that a

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[26] The Ninth Circuit notes in the decision below that in *H.F. Allen Orchards* the Federal Circuit "based its conclusion on the fact that the farmers were beneficial users of the water who ultimately paid for it." Appendix A at 14a n. 5.

[27] *Schuerman* holds that the proper test is "whether the contract reflects the express or implied intention of the parties to benefit the third party." 30 Fed.Cl. at 433. The plaintiff need not also show that the contract gives him or her the direct right to enforce the contract. *Id.* at 428, 429. The court discussed Section 313(2) of the *Restatement (Second) of Contracts* (1979) which discusses situations where the promisee is a "government" which contracts to benefit the "public" at large. *Id.* at 429, 430, 433. The Federal Circuit follows the test announced in *Schuerman*. *Montana v. U.S.*, 124 F.3d 1269, 1274 (Fed. Cir. 1997).

parent corporation was the real party in interest to sue the government for breach of a contract to design a submarine made by its wholly-owned subsidiary.

A case similar to *H.F. Allen Orchards* as to facts, reasoning, and outcome is *Henderson County Drainage District v. U.S.*, 53 Fed.Cl. 48 (2002), *reconsideration denied*, 55 Fed.Cl. 334 (2003). In 1961 drainage districts, which existed for the purpose of benefitting the farmers who had created them, made contracts with the Army Corps of Engineers to settle drainage claims arising from the Corps' operation of a water project. More than three decades later, farmers within the districts sued to enforce the contracts. The Court of Federal Claims held that they had standing, finding that the farmers would be reasonable in relying on the promises made in the contracts as manifesting an intent to create a right. *Id.* at 52.

At all times between 1984 and 2004, *H.F. Allen Orchards* remained the only circuit court decision to have ruled on the specific issue at bar. However, the Ninth Circuit in the case below explicitly declines to follow *H.F. Allen Orchards* and reaches the opposite conclusion, extending the reasoning of its 1999 *Klamath* decision.

In *Klamath* the Bureau made repayment contracts with irrigation districts within the Klamath Project. But the Bureau also contracted with a hydroelectric power company, which was not affiliated with the farmers, to operate a dam in that project. For nearly a century the contracts with the districts and the power company were honored by the Bureau. However, in 1977, in order to serve certain fish and wildlife purposes, the Bureau adopted a new operating plan under which it would sell less water to the districts than specified in their repayment contracts. The power company thereafter operated the dam in accord with the Bureau's new plan, which had the effect of reducing water deliveries to the farmers. Farmers sued the Bureau and the power company

for a declaration of their rights under the dam operation contract only. The farmers did not sue the Bureau to enforce their water rights under their districts' repayment contracts. The district court held that the farmers were not intended third-party beneficiaries of the dam operation contract between the Bureau and the power company. *Klamath Water Users Assn. v. Patterson,* 15 F.Supp.2d 990 (D. Or. 1998).[28] The court noted: "Reclamation must deliver water to project irrigators in accordance with the rights held by the United States in the project and the irrigators' individual repayment contracts, ..." *Id.* at 995. It concluded: "The [dam operation] contract is not the source of plaintiffs' rights to water in the Klamath Basin. Rather, their water rights are found primarily in their individual repayment contracts with the federal government and in state water law." *Id.* at 996. The Ninth Circuit affirmed. The Court relied primarily on Sections 302 and 313(2) of the *Restatement (Second) of Contracts* as the governing legal authority. *Klamath,* 204 F.3d at 1211.[29] It first stated that members of the public who benefit from a contract with their government are "generally assumed" to be incidental rather than intended beneficiaries. *Id.* Then it held that the Bureau's dam operation contract with the hydroelectric power company revealed no express or implied "intention" of either signatory to grant irrigators served by the project enforceable rights and, indeed, that the plain language of that contract was sufficient to "rebut" such contention. *Id.* The Court reasoned that recognizing any farmer's standing to sue under the dam operation contract would "open the door" to all to sue. *Id.* at 1212.

[28] The court cited *German Alliance Insurance* and other cases. *Id.* at 994. It did not cite *H.F. Allen Orchards.*

[29] The Ninth Circuit, like the district court, did not discuss *H.F. Allen Orchards.*

In the case at bar, the district court ruled in its 2000 opinion that, in light of *Klamath*, the farmers are "incidental," not "intended," third-party beneficiaries and, therefore, lack "standing" to sue. Appendix C at 29a-34a. The court found that the 1963 service contract contains no "direct right to sue" nor "enforcement rights." *Id.* at 31a. It relied on *Klamath*, but did not cite *H.F. Allen Orchards.*[30] *Id.* at 28a-31a.

On appeal below the Ninth Circuit affirms. Its decision extends *Klamath* and holds that the farmers in a reclamation project are "incidental" rather than "intended" third-party beneficiaries of a service or repayment contract between their district and the Bureau. Appendix A at 9a-14a. The Court holds it is "presumed" that members of the public who benefit from a contract made by a government are incidental third-party beneficiaries unless the contract evidences a "clear intent" to the contrary. *Id.* at 10a. While acknowledging that the 1963 service contract operates to the farmers' "benefit," and was entered into with them "in mind," it holds that that was "not enough" to confer standing to sue for breach of contract. *Id.* at 14a. The Court notes that its conclusion "may be at odds" with *H.F. Allen Orchards. Id.* at 14a n. 5. But it explicitly states: "To the extent that the Federal Circuit employs a different approach and reaches a different result, we respectfully disagree." *Id.*

[30] While the decision was on appeal, the same district court discussed it in two other reported decisions. The court ruled in *U.S. v. Westlands* that its decision below did not govern the farmers' claims. The court noted that the farmers in that case were the "real parties-in-interest" against the Bureau. 134 F.Supp.2d at 1156. It also stated: "No one else is willing to litigate these claims on their behalf." *Id.* The Bureau also relied on the district court's ruling in the instant case in another case, but the court did not rely upon it. *Del Puerto Water District v. Bureau of Reclamation*, 271 F.Supp.2d 1224, 1247-49, 1251 (E.D. Cal. 2003).

Thus, the Ninth Circuit has now declared a contractual standing rule which directly conflicts with the rule declared by the Federal Circuit in 1984. Under *H.F. Allen Orchards*, a farmer may sue the Bureau and obtain redress as an intended third-party beneficiary of his or her district's reclamation contract. The reasoning of that decision was founded on the fundamental nature and function of the Bureau, an irrigation district, and its farmers, as well as the legal and economic relations among them, in a federal reclamation project. Under the Ninth Circuit's new decision below, however, a farmer may not sue the Bureau nor secure a remedy for breach of the district contract, because he or she is merely deemed an incidental third-party beneficiary. Farmers are presumed incidental, because an irrigation district is a government and a farmer is a member of the public, and the presumption may be rebutted only by contract language of a clear intent to the contrary.

B. The issue whether a farmer is an intended or incidental third-party beneficiary of a reclamation contract between his or her irrigation district and the Bureau is important.

The Bureau has built and operates over 600 dams in the West which serve almost 10 million acres. Amy K. Kelley, "Federal Reclamation Law," in Robert E. Beck, Ed., *Waters and Water Rights* (Michie, Charlottesville, 1996) at § 41.02. Irrigation districts have made thousands of repayment or service contracts with the Bureau, and hundreds of thousands of farmers buy irrigation water thereunder.

Contracts are a key part of the reclamation program, and their performance repays the costs of the projects. Furthermore, farmers who apply the contracted water supply to irrigate crops thereby perfect the property rights required for project viability. These contract and property principles are largely what have made the reclamation program what it is.

The Bureau traditionally and generally lived up to its promises and honored farmers' rights.

But in recent decades new conditions severely challenge the traditional reclamation system. Budget-conscious legislators and executives look for new opportunities to impose extra-contractual water charges on farmers. Ever-growing urban areas explore ways and means to succeed to irrigators' water rights. And, most significant of all, private interest groups press their governments to take action to reallocate irrigation water to other in-stream uses under multiple environmental statutes.

Often an aggrieved farmer can count on his or her irrigation district to mount a legal challenge to political action which threatens to violate his or her water or water rights without payment of compensation. But there are many situations where districts decline to do so and farmers are left to fend for themselves.

One class of such cases embraces situations where a district represents two or more groups of farmers with differing rights, priorities, and interests. The two decisions creating the conflict in the circuits which is the subject of this petition aptly illustrate this phenomenon. In *H.F. Allen Orchards* the districts represented senior rights which could not be prorated, as well as junior rights which could. 4 Cl.Ct. at 604. Only junior rights, representing a minority in each district, were adversely affected by the Bureau's action, and the holders thereof were not able to persuade any district to prosecute a claim. *Id.* at 613 n. 8. Similarly, in the case at bar, as a result of the 1965 merger, there were two legislatively-created classes of farmers within the enlarged Westlands district, and as a result of the 1986 stipulated judgment each class was represented by judicially-appointed area representatives. The senior right holders were left to prosecute their own claims after Westlands dropped out of the case. Where a district is unable or unwilling to protect one

class of farmers because of the rights, priorities, or interests of a second class, the former are denied access to the courts to protect themselves if they are merely incidental.

A second situation in which the rights and interests of farmers differ from their irrigation district is where the alleged contract breach has already been consummated (the water has been reallocated, or the surcharges have been collected), and the remedy sought is retroactive money damages. In such cases, there exists doubt as to whether a district has standing to assert and recover a farmer's damages.[31] To the extent a district does have standing, there is the question of whether it has sufficient incentive to sue.

The question whether farmers have access to the federal courts when their district is unable or unwilling to sue the Bureau for breach of a reclamation contract, as in *H.F. Allen Orchards* and the case at bar, should be resolved by this Court. It is untenable that a farmer is an "incidental" third-party beneficiary of his or her district's contract if suit is brought in a district court of the Ninth Circuit, but an "intended" beneficiary if brought in the Court of Federal Claims. The breach of contract is the same in either forum, and standing should also be the same.

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[31] A district may have standing to recover overcharges. *Tulelake Irrigation District v. U.S.*, 342 F.2d 447 (Cl.Ct. 1965). It may also be able to seek at least its own damages for underdeliveries. *Flathead Joint Board of Control v. U.S.*, 30 Fed.Cl. 287, 295 (1993), *aff'd*, 59 F.3d 180 (Fed. Cir. 1995). But there is significant doubt it can prevail on such a claim for the direct benefit of its landowners. *San Carlos Irrigation and Drainage District v. U.S.*, 111 F.3d 1557, 1561-64 (Fed. Cir. 1997). Petitioners are aware of no case allowing a district to recover its farmers' lost profits arising from underdeliveries. On the other hand, assuming a farmer is an intended third party beneficiary, he or she would be able to recover his or her own damages. *Sumner Peck Ranch*, 823 F.Supp. at 746-47 (lack of service); *U.S. v. Westlands*, 134 F.Supp.2d at 1142-44 (excessive charges).

It is not a sufficient response that farmers, while denied a hearing in the district courts of the Ninth Circuit, can still pursue their contract claims in the Court of Federal Claims. A district court suit allows farmers to join with their contract claim a claim under the Administrative Procedure Act for violation of statute or the Constitution. It would be extremely inefficient both for the judiciary and litigants to require injured farmers to challenge Bureau misconduct first in the district court for prospective equitable relief and then in the claims court for retroactive monetary relief, if such a two-step procedure is permissible at all. Both challenges are based on the same misconduct and should be heard at the same time by the same court.

C. The Federal Circuit's well-established rule is correct, and the Ninth Circuit's conflicting new rule is incorrect.

The Ninth Circuit judges below "disagree" with the approach taken by the Federal Circuit and the result in *H.F. Allen Orchards*. Appendix A at 14a n. 5. But, except for that conclusionary statement of disagreement, the Court does not address the basic facts relied upon or the reasoning utilized in *H.F. Allen Orchards*. An examination of those matters demonstrates the correctness of the Federal Circuit's rule.

In *H.F. Allen Orchards* the Federal Circuit noted that reclamation project farmers have a "property right" in the water, are the "owners" of such property, and are the "beneficiaries" of the irrigation project. 749 F.2d at 1576. It is the farmers' use of the water which perfects the water right. *Nevada*, 463 U.S. at 116; *Nebraska*, 325 U.S. at 614. The right is appurtenant to their lands. 43 U.S.C.§§ 372, 485h-4. The Ninth Circuit ignores, and thereby treats as irrelevant, these fundamental facts.

The Federal Circuit's decision stated that districts contract with the Bureau as a "surrogate" for the aggregation of farmers. *H.F. Allen Orchards,* 749 F.2d at 1576. Another court called a district, in practical effect, nothing but an "intermediary" resorted to by the Bureau and the farmers. *Nampa & Meridian,* 283 F. at 570. The Ninth Circuit, itself, referred to Westlands Water District as a "middleman." *Barcellos & Wolfsen*, 899 F.2d at 824 n. 16. Once more, however, the Ninth Circuit does not address this fact in the decision below.

H.F. Allen Orchards held that farmers are "true parties in interest." 749 F.2d at 1576. Another court had also so held. *Nampa & Meridian*, 283 F. at 570. Even the district court below so ruled in another case involving farmers in the pre-merger Westlands area. *U.S. v. Westlands*, 134 F.Supp.2d at 1156.[32] But the Ninth Circuit here ignores these holdings.

The *H.F. Allen Orchards* court also noted that it is the farmers who ultimately "pay" for the services which the Bureau provides. 749 F.2d at 1576. Water diverted from irrigation to environmental purposes, as in the case at bar, does not get paid for by anyone. Federal deficits grow unless, as here, extra-contractual surcharges are added to the contractual charges for the remaining water which is delivered to irrigators. Again, the Court below is silent about these economic realities.

The Ninth Circuit fails to consider still other relevant factors. The original Westlands district was created by its farmers for the purpose of entering into service and re-

[32] Every action shall be prosecuted in the name of the real party in interest. Fed. R. Civ. Proc., Rule 17(a); R. Ct. Fed. Cl., Rule 17(a). Several circuit court decisions have addressed the third-party beneficiary issue in terms of the real party in interest rule. *Iowa Public Service Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 405-06 (8th Cir. 1977); *Capital Fire Insurance Co. v. Langhorne*, 146 F.2d 237, 241-43 (8th Cir. 1945).

payment contracts with the Bureau. The 1986 stipulated judgment among the two groups of farmers, Westlands, and the Bureau explicitly provided that the 1963 contract had been entered into for the benefit of those farmers' lands and it specified how a farmer or his or her area representatives could obtain judicial relief against the Bureau in the future. But the Court below ignores these basic facts.

The Court below, without any analysis, concludes that the farmers here were "[l]ike" those in *Klamath.* 358 F.3d at 1145. It does not deal with the admitted fact that *Klamath*, unlike the case at bar, did not adjudicate reclamation contracts made by a district to supply water to farmers who had created it for that purpose.

The Court below notes that, under the approach suggested by *Restatement* Section 313(2) and followed in *Klamath*, it presumes that the farmers were merely incidental beneficiaries because their district is a "government" which contracts to benefit the "public." But it deals with none of the facts that distinguish the special relationship between a farmer and his or her irrigation district, on the one hand, and the general relationship between a citizen and his or her government, on the other. A special-purpose irrigation district cannot properly be so equated to a general-purpose government. *Salyer Land Co.*, 410 U.S. at 728-29; *Ball*, 451 U.S. at 366-70.[33]

Instead, the Ninth Circuit's approach is simply to parse two articles of the 1963 contract for a "clear intent" that the parties regarded farmers as intended beneficiaries of its price and quantity terms. It reads the two sections restrictively, giving no consideration to other articles of the contract, its recitals as to the irrigation purposes of the contract, the

[33] One who merely aspires to buy land in an irrigation district has constitutional standing to sue the Bureau for violation of reclamation law. *Bryant,* 447 U.S. at 366-68.

statutory backdrop against which it was made, the permits and other contracts relating to it, or the stipulated judgment which enforced it. In short, the Ninth Circuit, unlike the Federal Circuit, applies two general rules announced in the *Restatement* to two specific articles of the contract, ignoring the existential facts about the Bureau, the farmers, their district, the contract and property relations among them, and the economic forces underlying those relationships.

The federal government should honor its commercial contracts with private citizens. *Lynch,* 292 U.S. at 579; *Perry v. U.S.,* 294 U.S. 330, 352 (1935); *Winstar,* 518 U.S. at 883-85, 894 n. 38, 895 n. 39, 903 n. 51 (plurality), 912 (Breyer, J., concurring), 924 (Scalia, J., concurring). Furthermore, for every wrong there should be a remedy. *Marbury v. Madison,* 5 U.S. 137, 162-63 (1803).

Where a water district is unwilling or unable to sue the Bureau for its alleged breach of a reclamation contract, the farmers who are the third-party beneficiaries of that contract and suffer damage when it is breached should have standing to sue, as the Federal Circuit has long and properly held, but the Ninth Circuit now improperly refuses to hold.

CONCLUSION

For these reasons, petitioners respectfully request that the Court grant review.

Respectfully submitted,

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May 18, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-16922

FRANCIS A. ORFF; BROOKS FARMS II; BROOKS FARMS IV; BROOKS FARMS V; G.S. FARMS; FIVE-D WESTSIDE FARMS, INC.; R & S FARMING; CARDELLA RANCH; GRAMIS FAMILY FARMS II; EDWIN R. O'NEILL, BRO PARTNERSHIP; BTO PARTNERSHIP; EJC PARTNERSHIP; ERO PARTNERSHIP; JEO PARTNERSHIP; SLO PARTNERSHIP; TBO PARTNERSHIP; C.S. STEFANOPOULOS TRUST; ELENA STEFANOPOULOS TRUST; ESTATE OF HELEN STEFANOPOULOS; D.D. STEFANOPOULOS TRUST; PAGONA STEFANOPOULOS; SUMNER PECK RANCH, INC.; Y. STEPHEN PILIBOS; PILIBOSCHILDREN'S TRUST,
Plaintiffs-Appellants,

WESTLANDS WATER DISTRICT,
Plaintiff-Intervenor,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF RECLAMATION; FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE; RONALD H. BROWN, SECRETARY OF COMMERCE; BRUCE BABBITT, SECRETARY OF THE INTERIOR,
Defendants-Appellees,

NATURAL RESOURCES DEFENSE COUNCIL; UNITED ANGLERS OF CALIFORNIA; SAVE SAN FRANCISCO BAY ASSOCIATION; CALIFORNIA WATERFOWL ASSOCIATION; SIERRA CLUB; BAY INSTITUTE OF SAN FRANCISCO; ENVIRONMENTAL DEFENSE FUND; CALIFORNIA STRIPED BASS ASSOCIATION; TROUT UNLIMITED OF CALIFORNIA; SACRAMENTO RIVER COUNCIL; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS; THE WILDERNESS SOCIETY,
Defendants-Intervenors-Appellees.

Argued and Submitted Feb. 11, 2003
Filed Feb. 18, 2004

Before: NOONAN, THOMAS and CLIFTON, *Circuit Judges*.

CLIFTON, *Circuit Judge*:

This appeal poses the issue of whether sovereign immunity bars individual landowners and water users (collectively, "the farmers") of the Westlands Water District ("Westlands") from suing the United States for allegedly having violated a contract the United States entered into with Westlands for the delivery of water. The district court originally concluded that sovereign immunity had been waived and proceeded to rule on the merits of the farmers' claims. The court then changed its mind on reconsideration, ruling that sovereign immunity barred the farmers' claims. We affirm that ruling. We agree with the district court that sovereign immunity deprived it of jurisdiction to hear the farmers' claims. Because the district court lacked jurisdiction to entertain those claims, we vacate the district court's rulings on the merits of those claims.

I. BACKGROUND

This is another in a long line of cases involving the Central Valley Project (the "CVP"), the nation's largest federal water

management project. Westlands receives water from the San Luis Unit of the CVP pursuant to a 1963 contract (the "1963 contract") with the United States.[1] The validity and enforceability of the 1963 contract was upheld in 1986 pursuant to a stipulated judgment in Stipulated Judgment, *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, (E.D.Cal.) (No. CV 79-106-EDP) ("*Barcellos*"), which resolved litigation that arose out of the government's assertion in 1978 that the 1963 contract was invalid. The *Barcellos* judgment required the government to perform the 1963 contract.

In 1990, the Sacramento River winter-run chinook salmon was listed as a threatened species under the Endangered Species Act (the "ESA"), 16 U.S.C. §§ 1531-1545. In 1993, the delta smelt of the Sacramento-San Joaquin Delta was also designated as a threatened species. The National Marine Fisheries Service determined that both species were jeopardized by the continued operation of the CVP. In response, the Bureau of Reclamation (the "Bureau") reduced Westlands' allocation of CVP water for 1993 to fifty percent of its contractual supply. The Bureau made this reduction pursuant to the ESA, which required federal agencies to avoid jeopardizing threatened species, and pursuant to the Central Valley Project Improvement Act (the "CVPIA"), which sought to protect the requirements of fish and wildlife in the use of CVP water. *See generally O'Neill v. United States*, 50 F.3d 677, 680-82 (9th Cir.1995) (discussing the aforementioned events more thoroughly).

Landowners and water users within the Westlands district then brought suit in district court, claiming that the reduction violated the 1963 contract as upheld by *Barcellos*. The district court held that Article 11 of the 1963 contract freed the

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[1] A general background of the CVP and the San Luis Unit was recently set forth by this court in *Westlands Water Dist. v. United States*, 337 F.3d 1092, 1095-96 (9th Cir.2003).

government from liability for the reduction. *Barcellos & Wolfsen v. Westlands Water Dist.*, 849 F.Supp. 717, 721-23 (E.D.Cal.1993) ("*Barcellos III*"). We affirmed, holding that Article 11(a) of the Contract "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *O'Neill*, 50 F.3d at 689. We noted, however, that the Westlands members could challenge the merits of the Bureau's compliance with the ESA and CVPIA in a separate case. *Id.*

Westlands instituted the present action in May 1993. The Natural Resources Defense Council ("NRDC") and the farmers subsequently intervened. In 1995, Westlands dismissed its complaint without prejudice. The farmers remained as plaintiffs and filed a second amended complaint.

On June 5, 1998, the district court filed an order that wiped out most of the farmers' claims. The court dismissed the statutory claims for lack of subject matter jurisdiction pursuant to the Tucker Act, although it noted that the farmers may be able to bring those claims in the Court of Federal Claims. The court rejected the farmers' contention that the reclamation statutes constituted contracts and dismissed those claims for lack of subject matter jurisdiction.

That left remaining: (1) the farmers' claim that the reduction violated appropriative water rights; (2) the farmers' claim that the reduction violated trust law; (3) the farmers' claim that certain CVPIA surcharges violated the 1963 contract and the Constitution; and (4) the farmers' claim that the reduction was in breach of the 1963 contract. With regard to the first two claims, the farmers asserted that the 1963 contract incorporated appropriative water rights and trust obligations. The farmers argued that all four of their remaining claims therefore arose under the 1963 contract, to which the government's waiver of sovereign immunity under 43 U.S.C. § 390uu allegedly applied. The court agreed with

the farmers that it had jurisdiction to consider these claims because the farmers were "a contracting entity" under § 390uu. But the court ruled against the farmers on the merits of the first three claims, granting summary judgment for the government. The farmers managed to keep their case alive when the court ruled that they had raised triable issues of fact with regard to the fourth claim.

Those issues would never be tried, however. On April 12, 2000, the court altered its ruling on sovereign immunity pursuant to a motion for reconsideration by the government. The court ruled that, in light of our decision in *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir.1999), the farmers were only incidental, not intended, third- party beneficiaries of the 1963 contract. As such, they were not "a contracting entity" under § 390uu toward whom the government had waived sovereign immunity. Finding no other basis for a waiver of sovereign immunity, the court entered final judgment for the government on August 1, 2000.

The farmers timely appealed. Though it had previously dismissed its claims as a plaintiff, Westlands returned to the litigation as an intervenor, out of concern that its rights could be affected. Both Westlands and the NRDC filed briefs in this appeal as intervenors.

II. SOVEREIGN IMMUNITY BARS THE FARMERS' SUIT

The government argues that the farmers' claims are barred by sovereign immunity. We review issues of sovereign immunity and subject matter jurisdiction *de novo*. *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir.1999). "It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir.1985). We strictly construe in favor of the government the scope of any waiver of sovereign

immunity. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999). Any claim for which sovereign immunity has not been waived must be dismissed for lack of jurisdiction. *Gilbert*, 756 F.2d at 1458.

As a preliminary matter, we reject the farmers' claim that the government's sovereign immunity defense is barred by issue and claim preclusion pursuant to the decision in *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 491 F.Supp. 263 (E.D.Cal.1980) ("*Barcellos I*"). For issue preclusion to apply, "the issues litigated must not be 'merely similar,' but must be 'identical.'" *Central Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir.2002) (citation omitted). In *Barcellos I*, the district court rejected the government's sovereign immunity defense on two alternate grounds. The first ground was that the *ultra vires* exception to sovereign immunity applied because the government had allegedly committed an *ultra vires* agency action. *Barcellos I*, 491 F.Supp. at 265-66. The second ground was that sovereign immunity had been waived pursuant to the McCarran Amendment, 43 U.S.C. § 666, because the relief sought fell under that amendment.[2] *Id.*, at 266-67.

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[2] The McCarran Amendment reads in pertinent part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . .

43 U.S.C. § 666(a) (1986).

Neither ground applies in this case. The farmers do not allege that the government committed an *ultra vires* agency action. Nor does the McCarran Amendment apply. This is a private lawsuit for damages between the farmers and the government, which is not the type of suit contemplated by the McCarran Amendment:

> The McCarran Amendment provides that the United States is deemed to have waived its immunity in any suit for the adjudication of rights to the use of water of a river system or other source [(§ 666(a)(1))], or for the administration of such rights [(§ 666(a)(2))]. The McCarran Amendment, however, does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream. *Dugan v. Rank*, 372 U.S. 609, 617-18, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) (citation omitted).

Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139, 144 (9th Cir.1987), *aff'd by California v. United States*, 490 U.S. 920, 109 S.Ct. 2273, 104 L.Ed.2d 981 (1989) (*per curiam*); *see also United States v. Dist. Court In & For Water Div. No. 5, Colo.*, 401 U.S. 527, 529, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971) (The McCarran Amendment "does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants."). This is not a suit to adjudicate or administer the rights of all claimants on a stream.[3]

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[3] The McCarran amendment also consents to suits for "administration of such rights," 43 U.S.C. § 666(a)(2). To come within § 666(a)(2), a suit must seek to enforce or administer rights of the sort covered by § 666(a)(1), already adjudicated. *See United States v. Hennen*, 300 F.Supp. 256, 263 (D.Nev.1968). Though Orff (or a relative) might have had his *general* stream water rights considered and adjudicated in *Barcellos* and *Barcellos I*, the farmers do not point to *specific* rights adjudicated in either case that the reductions at issue violate. Rather, they are seeking to

We note that the farmers did not even plead jurisdiction under the McCarran Amendment in their second amended complaint; they pleaded only under § 390uu.

Because the issue in *Barcellos I* is not identical to the issue presented in this case, the government is not issue precluded from claiming sovereign immunity. Nor does claim preclusion apply. One requirement of claim preclusion is that "the prior litigation involved the same claim or cause of action as the later suit." *Central Delta Water Agency*, 306 F.3d at 952. In evaluating this requirement, the most important consideration is "'whether the two suits arise out of the same transactional nucleus of facts.'" *Id.* (citation omitted). "[W]hen considering whether a prior action involved the same 'nucleus of facts' for preclusion purposes, we must narrowly construe the scope of that earlier action." *Id.* at 953. As explained above, the facts the district court relied on to find a waiver of sovereign immunity in *Barcellos I* do not apply here. Additionally, this action arises out of the government's allocation of CVP water for 1993 based on designations of threatened species that occurred long after *Barcellos I* had been decided. As such, the nucleus of facts underlying this action differs from the nucleus of facts underlying *Barcellos I.*

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enforce rights they argue are implicitly incorporated in the contract. Adjudication of general water rights in the prior cases is therefore insufficient for a waiver of sovereign immunity under § 666(a)(2) in the case at bar. Moreover, finding otherwise and granting waiver under § 666(a)(2) in this case would still be counter to the holdings of *Metropolitan Water Dist.* and *Dugan*, which expressly limit the government's consent in waiving sovereign immunity under the McCarran Amendment to those cases that implicate "the rights of *all* claimants on a stream."

The farmers' suit may nevertheless proceed in district court if the § 390uu waiver of sovereign immunity applies. Section 390uu provides in its entirety:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights *of a contracting entity* and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

43 U.S.C. § 390uu (emphasis added). The farmers assert that they are intended third-party beneficiaries of the 1963 contract and therefore "a contracting entity" under § 390uu. Our holding in *Klamath* compels us to reject this argument.

The plaintiffs in *Klamath* were irrigators in the Klamath Basin. The California Oregon Power Company ("Copco") and its successor in interest, PacifiCorp, operated a dam (the "Dam") in the Klamath Basin pursuant to a 1956 contract with the United States. *Klamath*, 204 F.3d at 1209. It was undisputed that "the Dam was built to help the United States satisfy its contractual obligations to water users in the basin, including the Irrigators." *Id.* "Copco's interest related primarily to controlling the flow of water to the Copco-owned hydroelectric facilities downstream from the Dam." *Id.*

Just as the 1963 contract is subject to the requirements of subsequently-enacted statutes such as the ESA and the CVPIA, *see O'Neill*, 50 F.3d at 686, operation of the Dam in

Klamath was also subject to the requirements of such statutes, *see Klamath*, 204 F.3d at 1209. In 1997, the Bureau of Reclamation issued an interim operating plan for the Dam in response to the designation of certain fish species in the Klamath River and Klamath Basin as threatened or endangered, and in consideration of the rights of certain Indian tribes. *Id.* at 1209-10. The Bureau and PacifiCorp modified the 1956 contract to implement the interim plan, but did not include the irrigators in the negotiations leading to the modification. *Id.* at 1210. The irrigators sued for breach of the 1956 contract based on their alleged status as third- party beneficiaries. *Id.*

We began our analysis by observing that, "[b]efore a third party can recover under a contract, it must show that the contract was made for its direct benefit—that it is an intended beneficiary of the contract." *Id.* While "the intended beneficiary need not be specifically or individually identified in the contract," it must still "fall within a class clearly intended by the parties to benefit from the contract." *Id.* at 1211. We presumed the irrigators to be incidental, rather than intended, beneficiaries of the 1956 contract unless the contract evinced "a clear intent to the contrary":

> Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract *absent a clear intent to the contrary*. Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.

Id. (emphasis added; internal citations and quotation marks omitted). We concluded after examining the plain language of the 1956 contract that the irrigators were not intended third-party beneficiaries: "The plain language of the Contract is sufficient to rebut the contention that the Irrigators are intended third-party beneficiaries. Neither Article 2 nor Article

6 illustrates an intention of Copco or the United States to grant the Irrigators enforceable rights." *Id.*

Like the irrigators in *Klamath*, the farmers in our case fail to satisfy the "clear intent" standard required to establish intended beneficiary status. The farmers rely on Articles 15 and 11(b) of the 1963 contract. To be sure, these provisions do make reference to third party water users, but neither provision evinces a clear intent to make the farmers intended beneficiaries. Though the opinion in *Klamath* did state that an explicit reference to a third party was not a *necessary* condition to finding that party to be an intended beneficiary, it in no way implied that an explicit reference was a *sufficient* condition to finding that party to be an intended beneficiary. Article 15 reads in pertinent part:

> Should any assessment or assessments required by the terms of this contract and levied by the District against any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void . . ., then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant thereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the Dis-

> trict nor lack of authority in the District, whether affecting the validity of District taxes or assessment or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

We agree with the district court that "[r]ather than manifesting an intent to create enforcement rights in individual water users, [Article 15] focuses on the absolute requirement that users first pay assessments and charges to the Districts to obtain water. It is only the District, not the water users, that has directly enforceable rights to obtain water from the government under the 1963 contract." Mem. Op. & Order Re Federal Defs.' Mot. to Recons., *Orff v. United States*, at 12-13 (E.D.Cal.2000) (No. 93-5327).

Article 15's references to third party "water users" do not establish that the farmers possess enforceable rights against the government. Article 15 states that "Contracts, if any, between the *District and the water users* involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract." (emphasis added) This sentence, however, in no way delineates a contractual relationship between the farmers and the government. It only describes a potential contractual relationship between Westlands and the farmers. Article 15 also provides that "no irregularity in levying taxes or assessments ... shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid for by such water user." This only seems to reinforce the view that the farmers must satisfy certain conditions precedent before obtaining water from Westlands; whatever rights the farmers accordingly have under Article 15 are against Westlands, not the government.

Indeed, Article 15 similarly states that "the payment of charges at the rate and upon the terms and conditions provided for herein is *a prerequisite to the right to the use of water furnished to the District.*" (emphasis added). Article 15, while defining in part the farmers' rights to water as provided by Westlands, does not demonstrate "an intention . . . to grant [the farmers] enforceable rights" against the government.

The farmers' reliance on Article 11(b) is similarly unavailing. Article 11(b) provides in full:

> In the event that in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article or any discontinuance or reduction of service as set forth in subdivision (d) of Article 9 hereof, less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year in a manner similar to that provided for in Article 7. To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

The farmers claim that the "anyone" referenced by Article 11(b) includes them. Article 11(b) does indicate that individuals that have a right "by, through, or under" Westlands to the water provided by the government have an "adjustment" remedy against the government where a shortage of water or discontinuation or reduction in service occurs. That said, Article 11(b) explicitly states that the adjustment remedy is a reduction "on account of the amounts paid to the United States" *by Westlands* pursuant to other provisions in the 1963 contract. Because only Westlands under the 1963 contract has direct contractual privity with the government and is obligated to pay it money, the contested language of Article 11(b)

can only sensibly refer to individuals or entities to whom Westlands has contractually *assigned* its rights and duties under the 1963 contract and who are now in contractual privity with the government. It cannot establish the inconsistent proposition that these same individuals or entities are intended third party beneficiaries of the contract.[4]

Article 15 and Article 11(b) merely show that the 1963 contract operates to the farmers' benefit and was entered into with the farmers "in mind." That by itself is not enough under *Klamath* to confer intended third-party beneficiary status on the farmers. *See Klamath*, 204 F.3d at 1212 ("Although the Contract operates to the Irrigators' benefit by impounding irrigation water, and was undoubtedly entered into with the Irrigators in mind, to allow them intended third party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract."); *see also id.* ("[T]he recitation of constituencies whose interest bear on a government contract does not grant these incidental beneficiaries enforceable rights."). Because the 1963 contract does not "illustrate[ ] an intention of [Westlands] or the United States to grant[the farmers] enforceable rights," *id.* at 1211, the farmers do not qualify for the § 390uu waiver of sovereign immunity as intended third-party beneficiaries.[5]

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[4] The farmers were never contractually assigned rights under the contract by Westlands, hence their current attempt to define themselves as intended third party beneficiaries.

[5] Our conclusion here and our decision in *Klamath* may be at odds with *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed.Cir.1984). In that case, farmers belonging to an irrigation district in Washington alleged that the Bureau had breached a contractual obligation to estimate accurately the amount of water it expected to supply them. *Id.* at 1573. The Federal Circuit concluded that the farmers were intended third-party beneficiaries of the contract at issue. *Id.* at 1576. That court did not, however, examine any contract language. Instead, it based its conclusion on the fact that the farmers were beneficial users of the water who

Nor do the farmers qualify for the § 390uu waiver under recordable contracts between them and the government. Pursuant to the 1963 contract, the farmers entered into recordable contracts with the government in the late 1960s and early 1970s regarding the sale of, and the farmers' rights to receive water for, excess lands. Excess lands were lands owned by water users that exceeded the maximum acreage permitted to receive CVP water under federal reclamation law. The recordable contracts subjected the right to receive water for excess lands to the provisions of both the 1963 contract and each recordable contract. The recordable contracts also required the sale of excess lands within a ten-year period and set forth an appraisal procedure to determine sale prices.

The farmers allege that each recordable contract "fully incorporates" the 1963 contract, thereby entitling them to sue the government under § 390uu as contracting entities of the recordable contracts. We disagree. Far from "fully incorporating" the 1963 contract, Article 5 of the recordable contracts simply subjects the farmers' rights to receive CVP water to the provisions of the 1963 contract and of the recordable contract.[6] Each recordable contract directly incorporates only Articles 23, 24, and 25 of the 1963 contract, which relate to the provision of water to, and the valuation and sale of, excess lands. Yet the farmers are not attempting

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ultimately paid for it. *See id.* As noted above, the mere fact that the farmers benefit from the 1963 contract is not enough to confer intended-beneficiary status on them. Rather, the law in our circuit requires an examination of the precise language of the contract for a "clear intent" to rebut the presumption that the farmers are merely incidental beneficiaries. Because no such clear intent is present in the contract, we cannot confer intended beneficiary status on the farmers. To the extent that the Federal Circuit employs a different approach and reaches a different result, we respectfully disagree.

[6] Article 5 states in its entirety, "All rights of the Landowner to receive Project water for his excess land shall be subject to the provisions of the District Contract and this contract."

to enforce any of those provisions, or any other provision of the recordable contracts, in this lawsuit. Instead, they are suing for an alleged breach of the 1963 contract. The fact that the farmers are contracting entities to recordable contracts that reference the 1963 contract does not make the farmers intended beneficiaries of the 1963 contract or otherwise give them a right to enforce that contract.

The *Barcellos* judgment does not qualify the farmers for the § 390uu waiver of sovereign immunity, either. Paragraph 23 of that judgment expressly provides that the judgment shall not be considered a contract or an amendment for purposes of § 390uu: "Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act." Thus, even though the farmers may be parties to the *Barcellos* judgment, that does not qualify them as "a contracting entity" for purposes of § 390uu.[7]

Finally, we reject the farmers' attempt to sue as trust beneficiaries. The farmers contend that Westlands acts as a trustee for them and that, because Westlands has failed to pursue a claim against the government, they may "step into the trustee's shoes" to sue. We disagree. Even if Westlands does act as a trustee for the landowners (an issue we do not decide), the farmers, as beneficiaries, have not met the requirements for suing in Westlands' shoes.

"[T]he beneficiary of a trust generally is not the real party in interest and may not sue in the name of the trust." *Saks v.*

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[7] The district court ruled that, even if paragraph 3 of the *Barcellos* judgment permits the farmers to bring this lawsuit, the suit may not be brought in district court because the farmers seek damages exceeding $10,000. *See* 28 U.S.C. § 1346(a)(2). The court noted that the farmers may be able to bring this suit in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491. As the farmers have not challenged this ruling on appeal, we do not consider it.

Damon Raike & Co., 7 Cal.App.4th 419, 8 Cal.Rptr.2d 869, 874-75 (1992). There is an exception to this rule, however. "[W]here a trustee cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee. In order to prevent loss of or prejudice to a claim, the beneficiary may bring an action in equity joining the third person and the trustee. The beneficiary may also sue third persons who directly participated with the trustee in breaches of trust." *Id.* at 875 (internal citations omitted). The farmers have neither sought judicial compulsion against Westlands, nor alleged that the government "directly participated" with Westlands in any breach of trust. They have therefore failed to establish that they may sue in the shoes of Westlands.

In sum, the district court properly dismissed the farmers' claims for lack of jurisdiction on the ground that they were barred by sovereign immunity. The farmers do not qualify for the waiver of sovereign immunity under the McCarran Amendment because the McCarran Amendment does not apply to this suit for money damages. Nor do the farmers qualify for the waiver of sovereign immunity under § 390uu. The farmers are not intended third-party beneficiaries of the 1963 contract under *Klamath*, and neither the recordable contracts nor the *Barcellos* stipulated judgment makes them "a contracting entity" under § 390uu. Finally, the farmers have not met the requirements for suing in the shoes of Westlands as beneficiaries.

III. THE DISTRICT COURT'S RULINGS ON THE MERITS MUST BE VACATED

"The very purpose of the [sovereign immunity] doctrine is to prevent a judicial examination of the merits of the government's position." *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir.1987). Because the government never waived its immunity from suit, the district court never had jurisdiction to issue its rulings on the merits of the farmers'

appropriative water rights, trust, and surcharge claims. *See United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). This holds true despite the fact that the district court issued those rulings at a time when it had determined that sovereign immunity had been waived. *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17, 71 S.Ct. 534, 95 L.Ed. 702 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation. . . .").

We must therefore vacate as nullities the district court's rulings on the merits of the appropriative water rights, trust, and surcharge claims. As we stated in *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376 (9th Cir.1988), "If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.' . . . If jurisdiction was lacking, then the court's various orders . . . were nullities." *Id.* at 1380-81 (internal citations omitted); *accord Finn*, 341 U.S. at 18, 71 S.Ct. 534 (requiring a district court to vacate judgment after having determined that the district court lacked subject matter jurisdiction over the suit); *United States v. 51 Pieces of Real Prop., Roswell, N.M.*, 17 F.3d 1306, 1309 (10th Cir.1994) ("[A] judgment is void if the court that enters it lacks jurisdiction over . . . the subject matter of the action."); *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 804 n. 6 (2d Cir.1984) ("[A] judgment entered by a court lacking subject matter jurisdiction may not stand."); *Cupey Bajo Nursing Home, Inc. v. United States*, 23 Cl.Ct. 406, 412 (1991) ("It is well settled that a question relating to subject matter jurisdiction goes to the very heart of our power to hear a controversy, and any decision on the merits rendered in the absence of such authority would, of course, be a nullity."). The district court's rulings on the merits of the appropriative water rights, trust, and surcharge

claims shall not be binding in this or any other case. *See United States v. Troup*, 821 F.2d 194, 197 (3d Cir.1987) ("A lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; . . . [the] earlier case can be accorded no weight either as precedent or as law of the case.") (quoting *Ala. Hosp. Ass'n v. United States*, 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original).

We recognize that, at times, "jurisdiction is so intertwined with the merits that its resolution depends on the resolution of the merits." *Careau Group v. United Farm Workers*, 940 F.2d 1291, 1293 (9th Cir.1991). But that is not the case here. The determinations that § 390uu and the McCarran Amendment were inapplicable to the farmers, and that the farmers could not sue in the shoes of Westlands, depended in no way on the merits of the farmers' appropriative water rights, trust, or surcharge claims. Indeed, in determining today that the government has not waived sovereign immunity, we have had no need to explore the merits of those claims.

Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), relied on by the government and by the NRDC, compels no different result. In *Bell,* the complaint alleged federal question jurisdiction under the Constitution. *Id.* at 679, 66 S.Ct. 773. Because the complaint sought recovery directly under the Constitution, the Supreme Court held that the district court had jurisdiction over the suit. *Id.* at 681-82, 66 S.Ct. 773. The Supreme Court explained that the district court "must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." *Id.* at 682, 66 S.Ct. 773. The Court instructed that if the district court in exercising its jurisdiction determined that the complaint failed to state a claim, then the case would have to be dismissed on the merits, not for lack of jurisdiction. *Id.* The core holding in *Bell* was "that the nonexistence of a cause of action was no proper basis for a

jurisdictional dismissal." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 96, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Bell is inapposite because the jurisdictional defect in our case does not arise from "the nonexistence of a cause of action." It arises because the government has not waived its immunity against the farmers' claims. That defect is separate and apart from the merits of the claims that the district court ruled on. The sovereign immunity issue and the merits of the appropriative rights and trust claims are simply not intertwined, as the resolution of one does not depend on resolution of the other.

IV. CONCLUSION

In summary, we affirm the district court's conclusion that sovereign immunity deprived it of jurisdiction to hear the farmers' claims. Because the district court lacked jurisdiction to entertain those claims, we vacate the rulings previously made by the district court on the merits of those claims.

AFFIRMED IN PART, VACATED IN PART, all parties to bear their own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5327 OWW SMS

FRANCIS A. ORFF, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Defendants-in-Intervention.

The Court, having heard and considered the cross-motions for summary judgment and all written authorities of the parties filed in this matter, as well as the oral arguments presented, final judgment is entered for Defendants and Environmental Intervenors as follows:

1. All issues that were not briefed for the August 21, 1997 summary judgment motions hearing are moot and have been withdrawn by Plaintiffs. *See* August 21, 1997 RT at 48:21-25 ("The issues we didn't brief we've conceded are moot and have withdrawn them."). The only issues briefed for the August 21, 1997 hearing were Plaintiffs': state appropriative water rights claims, *see* Doc. 562 at 1:22-24; trust claims, *see id.* at 2:10-22; federal Reclamation Law rights claims, *see id.* at 2:21-3:3; claims that the United States breached the 1963 Westlands Water District Contract and, if so, whether Plaintiffs were entitled to money damages. The June 5, 1998 Order addressed the first three issues as follows: summary judgment

was granted "to bar all Plaintiffs' state appropriative water rights claims," Doc. 588 at 48:19-21; summary judgment was granted to bar "all public and private trust claims," *id.* at 46:2-3; and Plaintiffs' non-contractual, statutory violation claims were dismissed without prejudice for lack of subject matter jurisdiction, *see id.* at 32:9-11, and summary judgment was granted as to any claims asserting the reclamation laws constitute contracts, *see id.* at 33:14-15. The only remaining claim was Plaintiffs' claim that the United States had breached the 1963 contract between Westlands and the United States.

2. In April 2000, the Court issue a "Memorandum Opinion and Order Re Federal Defendants' Motion to Reconsider." That Order found:

A. Plaintiffs are not intended third-party beneficiaries of the 1963 Contract between the United States and Westlands and the June 5, 1998 holding to the contrary was vacated. *See* Doc. 634.

B. Plaintiffs' money damages claims were dismissed for lack of subject matter jurisdiction, or in the alternative, transferred to the Court of Federal Claims. *See* Doc. 634.

C. Since April 2000, Plaintiffs have been given three opportunities to have the case transferred to the Court of Claims. Each time, they have objected by purporting to impose unilateral conditions on any transfer. The re-argument and objections by Plaintiffs are OVERRULED.

3. All claims have been resolved. JUDGMENT is entered in favor of Federal Defendants and Environmental Intervenors, and against Plaintiffs.

SO ORDERED.

DATED: August 10, 2000

/s/ Oliver W. Wanger
OLIVER W. WANGER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5327 OWW SMS

FRANCIS A. ORFF, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Defendants-in-Intervention.

MEMORANDUM OPINION AND ORDER
RE FEDERAL DEFENDANTS' MOTION
TO RECONSIDER

This matter is before the Court on the Federal Defendants' motion to reconsider.

I. INTRODUCTION

On June 5, 1998 the Court filed a memorandum decision regarding the parties' motions for clarification and reconsideration. A conforming order was filed August 14, 1998.

On January 22, 1999, Federal Defendants filed a motion to modify[1] the Decision on the grounds that Area I plaintiffs

[1] Federal Defendants' "Motion to Modify That Part of the Court's Memorandum Opinion and Order Holding That Plaintiffs Have Standing to Sue the Federal Defendants Under 43 U.S.C. 390uu With Regard to

lack standing to sue Federal Defendants under 43 U.S.C. § 390uu. The motion is construed as another motion for reconsideration in light of recently decided case law.

Environmental Intervenors filed a statement of non-opposition to Federal Defendants' motion February 4, 1999. Area I plaintiffs opposed the motion March 4, 1999.[2] The Federal Defendants filed a reply brief March 17, 1999.[3] The motion was heard March 29, 1999.

II. LEGAL STANDARD

Rule 60(b) permits reconsideration of a final judgment, order or proceeding of the district court on grounds of: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence that would support grounds for a new trial under Rule 59; 3) fraud of an adverse party; 4) judgment is void; 5) judgment has been satisfied, released or discharged ; or 6) any other reason justifying relief from the operation of the judgment. FED. R. CIV. P. 60(b).

Reconsideration is generally appropriate 1) when there has been an intervening change of controlling law, 2) new evidence has come to light, or 3) when necessary to correct a clear error or prevent manifest injustice. *See School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993); *see also* L.R. 230 (k) (requirements for application for reconsideration). "A motion for reconsideration is not a vehicle to

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Claims Arising Under Contracts Between Westlands and the United States", filed January 22, 1999, is referred to and cited in this memorandum opinion as "Motion".

[2] Plaintiffs' Opposition to Federal Defendants' Motion to Modify, filed March 4, 1999, is referred to and cited in this memorandum opinion as "Opposition".

[3] Federal Defendants' Reply Memorandum In Support of Motion to Modify, filed March 17, 1999, is referred to and cited in this memorandum opinion as "Reply".

reargue a motion or to present evidence which should have been raised before." *Bermingham v. Sony Corp. of America*, 820 F. Supp. 834, 856 (D.N.J. 1992), aff'd, 37 F.3d 1485 (3rd Cir. 1994). "A party seeking reconsideration must show more than a disagreement with the Court's decision. . . . [R]ecapitulation of the cases and arguments considered by the Court before rendering its original decision fails to carry the moving party's burden." *Id.* To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 514 (9th Cir. 1987).

"Clause 60(b)(6) is residual and 'must be read as being exclusive of the preceding clauses.'" *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement*, 791 F.2d 1334, 1338 (9th Cir. 1986) (quoting *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981)). Rule 60(b)(6) "is reserved for 'extraordinary circumstances.'" *Id.*

III. BACKGROUND

Westlands Water District, San Benito County Water District, San Luis Water District, and Panoche Water District filed this action May 17, 1993. They sought injunctive relief against Federal Defendants, alleging that several actions taken by Federal Defendants violated the Central Valley Project Improvement Act ("CVPIA") and the Endangered Species Act ("ESA"). Various groups intervened in the action, including Area I Plaintiffs in October 1993. (Doc. 51)

After two years of litigation, on September 6, 1995, Westlands, et al., moved to dismiss the case without prejudice. (Doc. 442) The motion to dismiss was granted and Area I Plaintiffs were given leave to file an amended complaint. (Doc. 464)

On November 14, 1995, the Area I Intervenors filed a "Second Amended Complaint" in which they allege the Court continues to have jurisdiction over the action under 43 U.S.C. § 390uu. (2d Am. Compl. ¶1, Doc. 465) They filed two motions for summary judgment on January 11, 1996. The first was for water year 1993-94 (Doc. 484) and the second was for water year 1994-95. (Doc. 485) The Court denied these motions April 24, 1997. (Doc. 548)

On May 30, 1997, the following three parties moved for reconsideration of that order: Federal Defendants (Doc. 558), Environmental Intervenors (Doc. 560), and Plaintiff Francis Orff (Doc. 562). These motions were addressed in an Order dated June 5, 1998. The Court held that Area I Plaintiffs are "intended third party beneficiaries with standing to litigate Westlands' contractual rights" (Mem. & Order at 18:3-5), and that the language of section 390uu is broad enough to allow money damages. (Mem. & Order at 23-24)

On January 22, 1999, Federal Defendants moved to modify the June 5, 1998 holding. (Doc. 613) They raise two issues. First, they argue that section 390uu does not give Area I Plaintiffs standing to sue. Second, they argue the Court erred when it allowed Area I Plaintiffs' claim for money damages in excess of $10,000.00 to remain in district court. Environmental Intervenors filed a statement of non-opposition to Federal Defendants' motion February 4, 1999. (Doc. 618) Area I Plaintiffs opposed the motion March 4, 1999 (Doc. 623) and Federal Defendants replied March 17, 1999. (Doc. 625)

On September 9, 1999, the Ninth Circuit decided *Klamath Water Users v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), which directly addresses the third-party beneficiary status of irrigators in the context of a contract between the United States Bureau of Reclamation and a utility. The Federal Defendants also refer to a District Court decision which also treats standing under § 390uu. *See State of Wyoming, et al. v.*

United States, 933 F.Supp. 1030, 1038 (D. Wyo. 1996). Given the new Ninth Circuit case law, reconsideration of the third-party beneficiary issue is appropriate.

IV. DISCUSSION

Federal Defendants challenge 1) the Court's conclusion that Area I Plaintiffs have standing to sue the United States under 43 U.S.C. § 390uu (Br. at 4), and 2) the Court's holding that Area I Plaintiffs can seek monetary damages for more than $10,000.00 in the district court under 43 U.S.C. § 390uu. (Br. at 15)

A. STANDING

1. Third-Party Beneficiary Standing

Area I Plaintiffs allege they have standing to sue under 43 U.S.C. § 390uu, which reads:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

43 U.S.C. § 390uu, The June 5, 1998 Order found Area I Plaintiffs to be "contracting entities" as defined by the statute because Area I Plaintiffs "are intended third party beneficiaries [of the contract between the United States and Westlands], "because their lands "are burdened by perfor-

mance obligations of the water service contract, including payment and acreage limitations." (Doc. 588 at 18:1-5)

It has been conceded that the Orff Plaintiffs are third-party beneficiaries. The 1986 Judgment entered by stipulation of the parties, including the United States, settled disputes under the 1963 contract. Paragraph 4.2 specifies that the 1963 contract was entered into for the benefit of Areas IA and IB and the lands therein. *See Barcellos and Wolfsen, Inc. v. Westlands Water District*, No. CV-79-106, (E.D. Cal. Dec. 30, 1986) (Judgment ¶ 4.2) ; *see also Barcellos and Wolfsen v. Westlands Water Dist.*, 849 F. Supp. 717, 720 (E.D. Cal. 1993) (listing among undisputed facts: "Movants are third party beneficiaries of the 1963 contract."); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 731 (E.D. Cal. 1993) ("Both Westlands and Plaintiffs agree that Plaintiffs are third-party beneficiaries to the 1963 and 1965 contracts between the United States and Westlands."). The government was a party to the judgment and has not, until now, moved for relief from the terms of the judgment. Nonetheless, "a recitation of constituencies whose interest bear on a government contract does not grant these incidental beneficiaries enforceable rights." *Klamath*, 204 F.3d at 1212.

Under the law of contracts, there are two types of third-party beneficiaries: intended and incidental. *See* RESTATEMENT (SECOND) CONTRACTS § 302. An incidental beneficiary has no legal right to enforce the contract. *See A.T. Kearney, Inc. v. International Bus. Machs.* Corp., 73 F.3d 238, 242 (9th Cir.1995). An intended beneficiary, however, does, *See Klamath*, 204 F.3d at 1211.

The June 5, 1998 Memorandum and Order found the burden on Plaintiffs' lands, namely the acreage limitation on ownership and District members' covenants to satisfy District payment obligations under the 1963 contract, evinced the requisite specific intent to make the Area I landowners

intended beneficiaries. *Klamath*, however, emphasizes the need for closer scrutiny of the contract language.

a. *Klamath Water Users Protective Ass'n v. Patterson*

Klamath held: "[t] o sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Klamath, 204* F.3d at *1211 (citing Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)).[4] Klamath applies the rule that "government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different interpretation is manifested. "*Id.* (citing RESTATEMENT (SECOND) CONTRACTS § 313(2))

("Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary."). Each contract provision must be examined to determine third-party standing.

In *Klamath*, the first contract provision at issue read:

> Copco shall operate and maintain for a period of fifty (50) years from the effective date hereof . . . Link River Dam, hereby constructed by Copco and transferred to the United States pursuant to the agreement of February 24, 1917. Copco may regulate the water level of Upper Klamath Lake between the elevations 4143.3 and 4137 . . . Provided, that the Contracting Officer from time to time may specify a higher minimum elevation than 4137 if in his opinion such must be maintained in

[4] Only intended third-party beneficiaries to a contract have standing sue on the contract. *See Klamath*, 204 F.3d at 1210. "One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her." *Id.* (citing RESTATEMENT (SECOND) CONTRACTS § 302(1) (b) cmt. d).

> order to protect the irrigation and reclamation requirements of Project Land. . . .

Id. The irrigators argued that this provision only allowed Copco to reduce the Lake's minimum elevation level "in order to protect the irrigation and reclamation requirements of Project Land," and such intended protection of Project land necessarily identified water user-landowners as expressly intended beneficiaries. *Id.* at 1212. The appeals court disagreed: "This sentence, however, does not manifest an intention to give third-party beneficiary rights to the Irrigators; rather, it grants discretion to the United States, through the person of the Contracting Officer, to enforce the Contract by taking control of the Dam." *Id.*

The second Klamath provision read:

> Nothing in this agreement shall curtail or in anywise be construed as curtailing the rights of the United States to Klamath Water or to the lands along or under the margin of Upper Klamath Lake. No Klamath Water shall be used by Copco when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land: Provided, That nothing in this agreement shall curtail or interfere with the water rights of Copco having a priority earlier than May 19, 1905. . . .

Id. at 1211. Irrigators contended that language that Copco may not use water "when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land," expressed the intent to give irrigators directly enforceable rights to protect their contract right to water. *Id.* The Ninth Circuit found: "This phrase, however, simply preserves the United States' ultimate control over the Dam and its

operations. It does not confer rights on the Irrigators." *Id.* The decision confirmed the United States' prior right to Klamath water for any purpose, including irrigation under the federal water service contracts.

b. *Plaintiffs claims re the 1963 Contract*

Here, Plaintiffs claim Articles 14, 15, and 16 of the 1963 contract manifest the mutual intent of the Bureau and Westlands to make water-user landowners intended third-party beneficiaries. (Pl. Opp. at 3:16-19) Article 14 reads:

> The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District. The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

This provision does not refer to any enforcement rights of any water user. Rather, it describes the applicable payment obligation by the Districts to the United States and states that all lands in the District are burdened by and subject to assessment and tax by the Districts. The Districts are responsible to pay any sum due the Bureau under the contract, even if individual water users are in default in payment to the Districts of users' taxes or assessments. The fact that landowners' lands within the District are burdened by such taxes or assessments does not, of itself, provide landowners a direct right to sue to enforce the District's right to water service. Article 14 does not mention water users or an intent to create enforcement rights in water users under the contract. Instead, it emphasizes the payment obligation of the District for all charges due the United States under the contract.

Article 15 reads:

> Should any assessment or assessments required by the terms of this contract and levied by the District against

any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void . . . then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant thereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, whether affecting the validity of District taxes or assessment or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

This provision references water users with respect to four subjects. First, unless a landowner pays any assessment or toll charged, water will not be made available by the District. Second, any contract between the District and a water user must contain a provision making that water-user/District water-service contract subject to the terms of the 1963 contract. Third, "payment (by the water user] of charges . . . is a prerequisite to the right to the use of water." Fourth, if there is an irregularity in the levying of taxes or assessments, or if the District acts beyond its authority, water users cannot "demand" water from the District unless they have paid all

charges imposed by the District. The last sentence does not provide a water user the right to directly demand water from the United States under the 1963 contract, rather, it creates a condition precedent to any water user's right to demand water from the District under the 1963 contract; i.e., payment of any charges at the rates and on the terms established by the District for water service under the 1963 contract. The provision defines absolute payment obligations for water users, but does not mention any direct enforcement right in water users against the United States. Rather than manifesting an intent to create enforcement rights in individual water users, the paragraph focuses on the absolute requirement that users first pay assessments and charges to the Districts to obtain water. It is only the District, not the water users, that has directly enforceable rights to obtain water from the government under the 1963 contract.

Article 16 reads:

> The District shall cause to be levied and collected all necessary taxes and assessments and shall use all of the authority and resources of the District to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its other obligations under this contract. The District may, either or both, require the payment of toll charges or levy assessments for such water supplied hereunder.

As with Article 14, Article 16 does not reference water users; rather, it describes the District's authority to charge toll (tax) water users or levy assessments to pay for water provided under District/water-user contracts to enable the District to meet all District payment obligations to the United States under the contract.

Closer scrutiny of all the 1963 contract terms reveals no language that expresses even ambiguous intent to create in water users direct enforcement rights against the United States. Plaintiffs are incidental, not intended, third-party

beneficiaries of the 1963 contract. Further support for this conclusion, that the 1963 contract did not grant Plaintiffs intended third beneficiary status, is Paragraph 4.2 of the 1986 Judgment that specifically vests enforcement rights in the District: "The District will enforce the prior rights of said areas to the benefits of said Contract and acknowledges that water users in Areas 2A and 2B may purchase water under the 1963 Contract not purchased by water users in Areas IA and 1B as provided in this Judgment. "Paragraph 4 (emphasis added). Although Area 2A and 2B water users are granted residuary water-purchase rights to District water by the 1963 contract and 1986 Judgment, no enforcement rights in such water against the United States are specified.

Further analysis shows that the 1963 contract does not provide Area I Plaintiffs standing to sue the United States for breach of that contract because they are neither contracting parties or intended third party beneficiaries.

c. *Standing Under the Recordable Contracts*

Area I Plaintiffs argue that even if the Court finds they are not intended third-party beneficiaries of the 1963 contract, they nonetheless have standing to sue under the recordable contracts. (P1. Opp. at 8:8-9:13) Plaintiffs are parties or successors to recordable contracts with the United States signed in the late 1960s and early 1970s. (P1. Opp. at 8:8-9). In substance, the recordable contracts address landowner rights with to receive CVP water for their "excess lands" (land owned by a water user which exceeds the maximum acreage permitted to receive CVP Project water under Federal reclamation law). These contracts provide that the right of any landowner to receive CVP14 Project water for excess lands is subject to the provisions of both the 1963 Contract and each recordable contract, and require sale of excess lands within a 10 year period at prices to be determined by the appraisal procedure set forth in the recordable contracts. An abatement provision exists in Paragraph 13, excluding any

year or years from the 10 year period for sale, in which water or service from the CVP may not be available to the land involved through no fault of the District or the Landowner. All recordable contracts have been performed.

Plaintiffs argue they have standing to enforce the terms of the recordable contracts as they are "contracting" entities with the United States to these contracts executed under federal reclamation law. The Federal Circuit has held that section 390uu covers all reclamation contracts, "not just repayment or water service contracts." *City of Tacoma, Washington v. Richardson*, 163 F.3d 1337, 1340 (Fed. Cir. 1998). Here, however, Plaintiffs do not claim breach of any rights under the recordable contracts; rather, they seek to enforce the 1963 contract.

Plaintiffs raise various arguments as to why they should be allowed to extrapolate standing from the recordable contracts to standing under the 1963 contract. First, they note that "[e]ach recordable contract recites that it is made 'in consideration of the direct and indirect benefits to be derived under' the 1963 contract," the 1963 contract is "being 'implemented' by the recordable contract," and the "recordable contract serves 'as an inducement to the United States to make water and distribution facilities available." (P1. Opp. at 8:9-14) Although all three of these statements reference the 1963 contract, none grants Plaintiffs the right to enforce the 1963 contract.

Second, Plaintiffs claim Article 5 of each recordable contract gives them standing. Article 5 reads, in pertinent part:

> All rights of the Landowner to receive Project water for his excess land shall be subject to the provisions of the District Contract and this contract.

Recordable Contract, art. 5. Article 5 does not address standing to enforce the 1963 Contract, it simply makes any right of a landowner to receive CVP water for excess land subject to both the 1963 contract and the recordable contract.

Third, Plaintiffs rely on Article 9 in each recordable contract, which provides:

> When any of the excess land covered by this agreement shall have been transferred in accordance with the provisions hereof to a person who, as the owner of such land, qualifies as a nonexcess Landowner under the District Contract, the land so transferred shall thereupon be subject to and governed by the terms and provisions of said District Contract applicable to nonexcess lands.

Recordable Contract, art. 9. No enforcement right for the 1963 contract is granted by art. 9 to a transferee of excess land, nor has any plaintiff alleged such transferee status.

Plaintiffs also contend that "a breach by the government of the 1963 contract is ipso facto a breach of each recordable contract." (Opp. at 8:22-23) This argument does not follow. Although any recordable contract holder or transferee of excess land is subject to the 1963 contract, terms applicable to nonexcess lands, the recordable contracts do not fully incorporate by reference the entire 1963 contract between the Bureau and Westlands. Paragraph 4 of the recordable contracts incorporates specifically by reference, only Articles 23, 24, and 25 of the District (1963) Contract. Articles 23, 24, and 25 of the 1963 Contract refer only to conditions of provision of Project water to excess lands owned by District landowners. The recordable contracts also only refer to excess lands. Plaintiffs do not allege they still own excess lands entitled to CVP water nor have they alleged any breach with respect to excess lands under the recordable contracts. The recordable contracts do not grant Plaintiffs standing to sue under the 1963 contract.

Plaintiffs do not explain how, if no direct enforcement rights against the United States exist in water users under the 1963 contract, the recordable contracts, which do not contain direct enforcement rights in the 1963 contract, could incorporate such non-existent enforcement rights. Plaintiffs refer to

no other provision of the recordable contracts to support the contention that those contracts confer direct enforcement rights or intended third-party beneficiary status on them.

d. *Standing Under the 1986 Barcellos Judgment*

Standing to enforce the 1986 judicially supervised settlement of the dispute over the 1963 contract, which incorporates the 1963 contract and its progeny, has been conferred on some of the Plaintiffs. The 1986 Judgment states "the District and the United States shall perform the 1963 *Contract." Barcellos and Wolfsen, Inc. v. Westlands Water District*, No. CV-79-106, ¶ 4.1 (E.D. Cal. Dec. 30, 1986). Paragraph 3 of the judgment provides: "[a] party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions." *Id.* ¶ 3 at 10:13-15. "The parties entitled to file such a motion shall be limited to the Area representatives provided for in Paragraph 22." *Id.* ¶ 3 at 11:4-7. Under the Judgment, the representatives of Area I initially were "Boston Ranch Company, Edwin O'Neill, Frank Orff, Stephen Pilibos and Fabry Farms." *Id.* ¶ 22.2 at 54:3-5. This suit is a "new" action and the Second Amended Complaint was brought by, *inter alia*, Francis Orff, Edwin O'Neill, and Stephen Pilibos. (Doc. 465 at 1) Federal Defendants do not argue that these representatives no longer have such authority and standing under the judgment to enforce its terms. Orff, O'Neill, and Pilibos are proper party plaintiffs. Whether they can maintain a suit for money damages under the *Barcellos* Judgment requires further analysis.

The court's earlier analysis found standing in the Area I Plaintiffs to maintain this suit under the authority of Paragraph 3, Enforcement of Judgment:

> A party may obtain relief from a violation of this judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions. . . . Provided, that any other appropriate relief may be

> obtained against the Federal parties by the filing of a new action for violation of . . . (b) any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, (ii) its future creation is anticipated or encouraged by this Judgment, or (iii) it is otherwise a subject of this Judgment.

This language, which authorizes a new action against the Federal parties for violation of "any contract or other right or obligation arising independently of this Judgment for any other appropriate relief "facially authorizes maintenance of this lawsuit which claims to redress a violation of the terms of "this [1986] Judgment" arising from a violation of any contract [the 1963 contract] or other right or obligation arising independently of this Judgment.

Even if it is assumed, *arguendo*, that Paragraph 3 of the 1986 Judgment confers standing, by interpreting this lawsuit as "a new action for violation of . . . any contract or other right or obligation arising independently of this Judgment for relief from a violation [of the 1986 Judgment]" the issue of whether a suit for money damages can be maintained in light of the Tucker Act requirements still must be analyzed.

B. TUCKER ACT JURISDICTION.

Although the 1986 Judgment is a contract between Area I Plaintiffs and the United States, the agreement does not necessarily confer the right to sue for damages in district court. The June 5, 1998 Memorandum and Order found subject matter jurisdiction under 42 U.S.C. § 390uu, citing *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 746-47 (E.D. Cal. 1993), which held: "Section 390uu displaces the Tucker Act in its waiver of sovereign immunity and allows the district court to hear Area I Plaintiffs' claims for money damages." (Mem. & Ord. at 23:23-24:11) A separate provision-by-provision analysis of

whether section 390uu applies to the 1986 Judgment was not undertaken. The motion to reconsider subject matter jurisdiction over contract claims for damages requires such an analysis.

1. Effect of Paragraph 23 of the Judgment.

The 1986 Judgment evinces an express intent by both parties to render section 390uu inapplicable to suits to enforce its terms. The parties explicitly stipulated in paragraph 23:

> Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act.

See Barcellos and Wolfsen, Inc. v. Westlands Water District, No. CV-79-106, ¶ 23 (E.D. Cal. Dec. 30, 1986) (judgment). Section 203(a) of the 1982 Act is codified at 43 U.S.C. § 390cc, and reads:

> The provisions of this subchapter shall be applicable to any district which—
>
> (1) enters into a contract with the Secretary subsequent to October 12, 1982;
>
> (2) enters into any amendment of its contract with the Secretary subsequent to October 12, 1982, which enables the district to receive supplemental or additional benefits; or
>
> (3) which amends its contract for the purpose of conforming to the provisions of this subchapter.

43 U.S.C. S 390cc(a). Area I Plaintiffs cannot invoke section 390uu to enforce the.1986 Judgment because Paragraph 23 of that Judgment stipulates the Judgment is not a "390uu contract." The ability to sue for money damages in the district court must come from another source.

2. Waiver of Sovereign Immunity Independent of § 390uu.

Primary jurisdiction over claims against the United States for breach of contract is vested in the claims court under the Tucker Act, which waives the government's sovereign immunity:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a) (1) To invoke the Tucker Act, a plaintiff seeking monetary damages must "point to a money-mandating constitutional provision, statute, regulation, or contract with the United States affording it a right to money damages." *Terran ex rel. Terran v. Secretary of Health and Human Serv.*, 195 F 3 d 1302, 1309 (Fed. Cir. 1999). If a plaintiff can point to such a "money-mandating" provision, and if the damage amount does not exceed $10,000, federal district courts and the Court of Federal Claims have concurrent jurisdiction. *See* 28 U.S.C. § 1346(a)(2). Here, Area I Plaintiffs seek, *inter alia,* in excess of $16,000,000 for the 1993-94 water year and in excess of $16,000,000 for the 1994-95 water year for breach of contract monetary damages. (Doc. 465 at 50:22-24) In general, only the Federal Court of Claims has jurisdiction for money damages in the amounts sought by Area I Plaintiffs.

There is, however, one exception to this rule. A contract claim for money damages may be asserted against the United States in a district court "if there is an independent waiver of sovereign immunity outside the Tucker Act." *Presidential Gardens Assocs. v. United States of America*, 175 F.3d 132, 141 n.2 (2d Cir. 1999). Area I Plaintiffs argue that such an independent waiver exists in paragraph 3 of the 1986 judg-

ment' because it "explicitly allows Area I farmers to sue the government for 'any other appropriate relief' for breach of the 1963 contract." (Opp. at 9 n.10) Paragraph 3, entitled, "Enforcement of Judgment," reads:

> A party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions. Either of these proceedings against the Federal parties shall, except as otherwise specifically limited by Paragraphs 6.1, 12.1.1, 12.1.2, and 12.3 of this Judgment, be for the sole purpose of seeking an order directing Federal parties to perform in accordance with the express terms of this Judgment; provided, that any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of (a) Paragraph 5 below or (b) any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, (ii) its future creation is anticipated or encouraged by this judgment, or (iii) it is otherwise a subject of this judgment.

Any party who files an enforcement motion in the *Barcellos* case or a new action to enforce that Judgment, is limited to the remedies specified by paragraph three. *See* Judgment 1 3 ("The parties shall not seek judicial enforcement of this Judgment in any other manner than described above."). Analysis of Paragraph 3's language is required.

Paragraph 6.1 mandates that the Federal Parties develop, adopt, and submit a Drainage Plan for Drainage Service Facilities. (Judgment ¶ 6.1) Remedies available for an alleged breach of this paragraph "shall be strictly limited to (a) the release to the District of the money then deposited in the Drainage Trust Fund, plus accumulated interest . . . and (b) the revival of any claim against the United States of the right to drainage service." (Judgment ¶ 6.1) A separate lawsuit addresses drainage claims under paragraph 6.1.

Paragraph 12.1.1 requires that the Federal Parties "enter into a long-term [water service] contract under Section 9(e) of the 1939 Act on behalf of the United States with an improvement district of the District encompassing all of the territory described in paragraph 11.1 above, for the firm annual delivery of the amounts of Central Valley Project water referred to in Paragraph 5 . . . ." (Judgment 1 12.1.1) The available remedies "to a party for breach of this paragraph 12.1.1 by the Federal Parties" are limited to: "(1) the revival of any claim otherwise preserved pursuant to Paragraph 14.1.1, below, or (2) the bringing of a new action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*"(Judgment 1 12.1.1)

Paragraph 14.1.1 is one of the claims for which the right to judicial relief in another action is preserved, *see* Judgment 1 14.1, and provides:

> Any claim of (a) a long-term right to the water service provided for in Paragraph 5 above at an agricultural water service rate of $7.50 per acre foot, and (b) if such a right is held not to exist, a right to recover the costs of operation and maintenance of the Pleasant Valley (Coalinga) Canal and Pumping Plant incurred by the District; provided, that such claims may be asserted only if the Federal Parties do not offer the District or an improvement district of the District encompassing Areas 2A and 2B a contract as described in Paragraph 12.1.1 above within a reasonable time prior to the expiration of the term of provisional water service provided for in Paragraph 5.2.4 above.

This language does not support a claim for money damages[5] for failure to provide water. Nor does the Administrative Procedure Act-("APA"), which does waive

[5] It has been the subject of prior litigation. *See Barcellos v. Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990).

the United States' sovereign immunity, but not as to money damages. *See* 5 U.S.C. § 702.

Paragraph 12.1.2 provides:

> the Federal Parties will make a good faith effort to construct water distribution and collector drainage facilities needed in the District in addition to those constructed under the 1965 Contract; Provided, that the sole remedy available to party for an alleged breach of this Paragraph 12.1.2 by the Federal Parties shall be limited to pursuing a claim as described in Paragraph 14.1.8 below.

Judgment ¶ 12.1.2. Paragraph 14.1.8 is one of the claims not affected by the 1986 Judgment, *see* Paragraph 14.1, and provides:

> Any claim of a party against the United States of a legal right to have additional water distribution or collector drainage facilities constructed within the District in addition to those constructed pursuant to the 1965 Contract; provided, that such claim may be asserted only in the event that the Federal Parties fail to perform in accordance with the terms of Paragraph 12.1.2 above, and not otherwise.

Judgment ¶ 14.1.8. These paragraphs only provide a remedy for failure to construct water distribution or collection drainage facilities and are the subject of a separate lawsuit. See *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000). There is no mention of money damages.

Paragraph 12.3 provides:

> At such time as additional Central Valley Project water becomes available for long-term contracting, the Federal Parties . . . shall make a good faith effort to provide for delivery of an additional annual supplemental water supply to an improvement district.

Under Paragraph 12.3, legal action available in the event of a breach by the Federal Parties is "the bringing of a new action

pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*." ¶ 12.3. The APA does not allow for money damages.

The remaining remedy found in Paragraph 3, relied upon by Plaintiffs, provides, in part:

> *any other appropriate relief* may be obtained against the Federal parties by filing a new action for violation of (a) Paragraph 5 below or (b) any contract or other right or obligation arising independently of this Judgment notwithstanding that (i) it is required to be performed by this judgment, (ii) its future creation is anticipated or encouraged by this judgment; or (iii) it is otherwise a subject of this Judgment.

(Judgment ¶ 3, emphasis added) Paragraph five discusses provisional water service to the District. *See* Judgment ¶ 5. It does not mention money damages. Subsection (b) refers to "any contract or other right arising independently of this Judgment notwithstanding that "such right is provided for, anticipated or encouraged, or is otherwise a subject of the Judgment. Area I Plaintiffs focus on the phrase "any other appropriate relief" and argue this subsection (b) is broad enough to support a claim for money damages for breach of the 1963 contract. *See* Opp. at 9 n.10. Because ¶ 23 removes the Judgment from § 390uu waiver of sovereign immunity, money damages are not "appropriate relief." This contention fails to address additional issues.

Assuming, *arguendo*, Paragraph 3 is broad enough to provide Plaintiffs standing to sue, the 1986 Judgment itself is not a 390uu contract, and cannot invoke 390uu's waiver of sovereign immunity. The 1963 contract has been analyzed above and found not to be a contract under § 390uu as to Area I plaintiffs.

Whether there is a waiver of sovereign immunity and, if so, whether money damages is an available remedy, are "two

'analytically distinct' inquiries." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484 (1994). "It is a well-settled principle that the federal government's sovereign immunity may only be waived by Congressional enactment." *Presidential Gardens*, 175 F.3d at 140. Here, there is no evidence that Congress adopted a legislative enactment to independently authorize or ratify the 1986 Judgment. Rather, the Judgment is a contract between the Department of Interior and the other signatories. Agency officials do not have the power to waive the nation's sovereign immunity. *See United States v. Mitchell*, 463 U.S. 206, 215-16 (1983) ("[N] o contracting officer or other official is empowered to consent to suit against the United States.").

Even assuming, arguendo, Subsection (b) of paragraph 3 is as broad a waiver of sovereign immunity as Plaintiffs contend, "[a] claim for damages against a federal agency is barred by sovereign immunity unless Congress has consented to suit." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1460 n.6 (9th Cir. 1985). Since Congress did not enact legislation to authorize the 1986 Judgment and consent to suit, the requirement for Congressional action waiving sovereign immunity has not been met. Area I Plaintiffs' claims for money damages cannot be maintained in this Court. Rather, if maintainable, it is only maintainable by Area I parties in the Court of Claims.

V. CONCLUSION

The June 5, 1998 holding that Area I Plaintiffs are intended third-party beneficiaries is VACATED. Under *Klamath*, Area I Plaintiffs are not contracting parties or intended third-party beneficiaries of the 1963 Contract. Even if Plaintiffs have 390uu standing under the recordable contracts, they do not sue for breach of any obligation under the recordable contracts as a violation of the 1986 Judgment.

On the Tucker Act issue, whether jurisdiction exists to hear a contract claim for money damages in excess of $10,000 against the United States, the June 5, 1998 ruling is VACATED. Area I's claims must be dismissed for lack of subject matter jurisdiction or transferred to the Court of Claims. Area I Plaintiffs shall have ten (10) days following date of service of this decision to notify the Court whether they wish their money damages claims transferred to the Court of Claims. Federal Defendants shall submit a prepared order that conforms to the decision within fifteen (15) days following date of service of this decision.

So ORDERED.

DATED: April 12, 2000.

/s/ Oliver W. Wanger
OLIVER W. WANGER
United States District Judge

APPENDIX D

43 U.S.C.A. § 390uu

Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.